This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HDI
HL 4GT2 3

Digitized by Google

Bd Jan. 1943

HARVARD LAW SCHOOL
LIBRARY

Received Nov. 18. 1908

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

CIVIL CODE OF LOWER CANADA

ANNOTATED.

VOL. I.

Digitized by Google

Digitized by Google

Quebec (Province) Laws, statutes, etc. - Codes
Civil
C7

CIVIL CODE

OF

LOWER CANADA

3 55 16

WITH THE

AMENDMENTS EFFECTED BY IMPERIAL, FEDERAL AND PROVINCIAL LEGISLATION,

AND ALL

REPORTED CASES FROM THE EARLIEST REPORTS UP TO 1st OCTOBER 1888,

BY

WILLIAM PRESCOTT SHARP, B.C.L.

ADVOCATE, OF THE BAR OF THE PROVINCE OF QUEBEC,

Crown Prosecutor at the late State Trials at Battleford.

VOL. I

ARTS. 1-1599.

6

MONTREAL

A. PERIARD, LAW BOOKSELLER AND PUBLISHER.

1889

CAN Q
310 S
E89

Digitized by Google

Can
2
132.1
888

Entered according to Act of Parliament of Canada, in the year 1889, by W. P. SHARP and A. PERIARD, in the office of the Minister of Agriculture, Ottawa.

NOV 18 1908

Digitized by Google

PREFACE.

In offering to the public, for the first time since its enactment, an English Edition of the Civil Code of Lower Canada, with annotations and amendments, it is necessary to make but few remarks, the benefits arising from codification, so long enjoyed in France, having now been sufficiently proved in this Province to render comment superfluous.

The plan adopted in compiling this book has been to take the Civil Code, as originally published by authority of the Act of Parliament in that behalf, and, at the end of each article, to cite the various authorities from which the codification committee drafted the articles, adding occasional references to new authors. When an article, or portion of an article, embodies new law, it is enclosed in square brackets, thus enabling the reader to ascertain where the existing law differs from that in force prior to codification. When any alteration has been made to an article since the promulgation of the Code, by Imperial, Federal or Provincial legislation, such change is next inserted under the title of amendment. (*) Following this, the decisions of the various Courts of this Province, the Supreme Court and the Privy Council, affecting the article in question, are given, preceded in every instance by the name of the tribunal by which such judgment was rendered. Many decisions which are obviously no longer applicable are cited, but as it would have

(*) The Revised Statutes of Quebec having been published since the first volume of this work was printed and some of the articles of the code having been changed by the consolidation of the Acts originally amending them, each article so changed has been marked with an asterisk and such amendments are to be found in the Appendix at the end of the first volume. In the second volume, the amendments effected by the Revised Statutes of Quebec will be found noted at their appropriate places in the text itself.

Digitized by Google

been too responsible a task to discriminate in all cases, it was thought wiser to do so in none.

The value of a work of this kind necessarily depends entirely on its accuracy. It is believed that, so far as regards the articles of the Code itself, they are letter perfect. In these and the statutory amendments thereto, particular care has been taken to preserve even the precise punctuation of the original. Whilst great pains have been taken to secure accuracy in all other respects, the author cannot venture to hope that the book will be found free from mistakes, but, as it is his intention to publish yearly supplements containing the different amendments and decisions of the preceding year (so arranged that a reference to the last supplement issued will indicate all previous alterations) he hopes, with the aid of the profession, that the work will be made perfect in the course of a short time. With this view he earnestly requests all who discover errors of any kind herein to report the same to him in order that they may be noted from time to time in their appropriate places in the supplements.

The extremely limited sale of Lower Canadian law books rendering any hope of pecuniary renumeration, of at all an adequate character, out of the question, the author would be well content were he satisfied that he had compiled a work which will prove of service to his co-labourers in an arduous profession and, to secure this, he sincerely trusts they will co-operate in the manner suggested.

W. PRESCOTT SHARP.

1724 Notre-Dame Street,
MONTREAL.

Digitized by Google

TABLE OF CONTENTS.

VOL. I.

List of abbreviations..... VIII
Table showing dates of publication of the various Statutes and Law Reports cited..... X
An Act respecting codification..... XI
An Act respecting the Civil Code..... XVI
Proclamation..... XIX
General Index to Civil Code..... XXIII
Civil Code—Articles 1 to 1599..... 1
Appendix..... 721

VOL. II.

Civil Code—Articles 1600 to 2615.....
Table of cases.....
Alphabetical Index.....
Concordance Table with Code Napoleon.....

Digitized by Google

ABBREVIATIONS.

Al.	Alinéa.
Anc. Den.	Ancien Denizart.
App. Cas.	Appeal Cases before the Privy Council, from 1876 to 1888.
Arr.	Arrêt.
Art.	Article.
C. C.	Civil Code of Lower Canada.
C. C. P.	Code of Civil Procedure of Lower Canada.
C. C. V.	Code du Canton de Vaud.
C. D.	Cassel's Digest of Supreme Court Cases.
C. L.	Code of Louisiana.
C. N.	Code Napoléon.
C. R.	(Preceding the names of the parties to a case) means the Superior Court for Lower Canada presided over by three judges, whether sitting as a Court of Review or otherwise.
C. S. C.	Consolidated Statutes of Canada.
C. S. L. C.	Consolidated Statutes of Lower Canada.
Cod.	Codex justinianus.
Com.	Communauté.
Cout. d'Orl.	Coutume d'Orléans.
D.	Dominion Statutes.
Décl.	Déclaration.
ff.	Digestum justiniani,
Gin.	Gin.—Analyse du droit Française.
Gl.	Glose.
Guy.	Guyot.—Répertoire.
Hyp.	Hypothèques.
I. S.	Imperial Statute.
Inst.	Institutiones justiniani.
K. B.	Court of Kings Bench.
Knapp's P. C. Rep.	Knapp's Privy Council Reports.
L. C. J.	Lower Canada Jurist.
L. C. L. J.	Lower Canada Law Journal.

Digitized by Google

L. C. R. ..... Lower Canada Reports.
L. N. ..... Legal News.

M. C. R. ..... Montreal Condensed Reports.
M. L. R.—S. C. ..... Montreal Law Reports.—Superior Court.
M. L. R.—Q. B. ..... Montreal Law Reports.—Queen's Bench.
Mar. ..... Marriage.
Marc. ..... Marcadé.
Moore's P. C. Rep. ..... Moore's Privy Council Reports.
Moore's P. C. Rep. [N. S.] Moore's Privy Council Reports, [New Series.]

N. Den. ..... Nouveau Denizart.
N. Pig. ..... Nouveau Pigeau.
Nov. ..... Novellæ.

Obl. ..... Obligations.
Ord. ..... Ordonnance.
Ord. du Com. ..... Ordonnance du Commerce.
Ord. de la Mar. ..... Ordonnance de la Marine.
Ord. de Subst. ..... Ordonnance des Substitutions.
Ord. de Test. ..... Ordonnance des Testaments.
Orl. *or* Orléans. ..... Coutume d'Orléans.

Pand. ..... Pandectes.
Pand. Franç. ..... Pandectes Françaises.
Paris. ..... Coutume de Paris.
P. C. App. Cas. ..... Privy Council Appeals (A.D. 1867 to 1875.)

Q. ..... Quebec Statute.
Q. B. ..... (Preceding the names of the parties to a case) Court of Queen's Bench.—Appeal side.
Q. B. R. ..... Queen's Bench Reports. (Décisions de la Cour d'Appel.)
Q. L. D. ..... Stephen's Quebec Law Digest.
Q. L. R. ..... Quebec Law Reports.

R. A. C. ..... Ramsay's Appeal Cases.
R. C. ..... Revue Critique,
R. S. C. ..... Revised Statutes of Canada.
R. S. Q. ..... Revised Statutes of Quebec.
R. de L. ..... Revue de Législation.
R. L. ..... Revue Légale.
Rép. ..... Répertoire.

S. C. R. ..... Supreme Court Reports.
Soc. ..... Société..
St. Imp. ..... Imperial Statutes.
Subst. ..... Substitutions.

Thev. d'Ess. ..... Thevenot D'Essaules.
Thev. d'Ess. (Can. Ed.). Thevenot D'Essaules, (Canadian Edition, by Judge Mathieu A. D. 1888.)

V. *or* Vict. ..... Victoria.

Digitized by Google

Table showing the Date of Publication of the various Law Reports and Statutes, Federal and Provincial, since the Promulgation of the Civil Code of Lower Canada. (1 August 1866.)

	Dom. Stat.	Quebec Stat.	Moore's P. C. Rep. [N.S.]	P. C. App.Cas.	L.C.R.	L. C. J.	L.C. L. J.	R. L.	R. C.	Q.L.R.	App. Cas.	S.C.R.	L. N.	Q.L.D.	Thémis	Q.B.R.	M.L.R. S. C.	M.L.R. Q. B.	R.A.C.
1866	.....	.....	3	.....	16	9	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1867	31 V.	.....	4	1	17	10 & 11	2 & 3	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1868	31 V.	31 V.	.....	.....	.....	12	4	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1869	32-33 V.	32 V.	5	2	.....	13	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1870	33 V.	33 V. 34 V.	6	.....	.....	14	.....	2	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1871	34 V.	35 V.	7	3	.....	15	.....	3	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1872	35 V.	36 V.	8	.....	.....	16	.....	4	2	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1873	36 V.	37 V.	9	4	.....	17	.....	5	3	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1874	37 V.					18	.....	6											
1875	38 V.	38 V. 39 V.	.....	5	.....	19	.....	7	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	.....
1876	39 V.	40 V.	.....	6	.....	20	.....	—	.....	2	1	.....	.....	.....	.....	.....	.....	.....	.....
1877	40 V.		.....	.....	.....	21	.....	8 & 9	.....	3	2	.....	.....	.....	.....	.....	.....	.....	.....
1878	41 V.	41 V. 41-42 V.	.....	.....	.....	22	.....	—	.....	4	3	1	1	1	.....	.....	.....	.....	.....
1879	42 V.	42-43 V.	.....	.....	.....	23	.....	—	.....	5	4	2	2	.....	1	.....	.....	.....	.....
1880	43 V.	43-44 V.	.....	.....	.....	24	.....	10	.....	6	5	3	3	.....	2	.....	.....	.....	.....
1881	44 V.	44-45 V.	.....	.....	.....	25	.....	—	.....	7	6	4	4	.....	3	1	.....	.....	.....
1882	45 V.	45 V.	.....	.....	.....	26	.....	11	.....	8	7	5	5	2	4	2	.....	.....	.....
1883	46 V.	46 V.	.....	.....	.....	27	.....	—	.....	9	8	6	6	.....	5	3	.....	.....	.....
1884	47 V.	47 V.	.....	.....	.....	28	.....	12	.....	10	9	7	7	.....	.....	4	.....	.....	.....
1885	48-49 V.	48 V.	.....	.....	.....	29	.....	13	.....	11	10	8	8	.....	.....	.....	1	1	.....
1886	49 V.	49-50 V.	.....	.....	.....	30	.....	14	.....	12	11	9	9	3	.....	.....	2	2	.....
1887	50-51 V.	50 V.	.....	.....	.....	31	.....	15	.....	13	12	10	10	.....	.....	.....	3	3	1
1888	51 V.	51 V.	.....	.....	.....	32	.....	16	.....	14	13	11	11	.....	.....	.....	4	4	.....

NOTE.—The following Law Reports published before the coming into force of the Civil Code are also referred to in this Book.

Knapp's Reports of cases before the Privy Council	3	volumes	1829-1836	Pykes Reports	1	volumes	1810
Moore's Privy Council Reports	15	"	1836-1862	Lower Canada Reports	15	"	
Moore's Privy Council Reports (New Series)	4	"	1862-1866	Montreal Condensed Reports	1	"(2nd Ed)	1884
Révue de Législation	3	"	1846-1848	Stuarts Lower Canada Reports	1	"	1834
Lower Canada Jurist	8	"	1856-1865				

Digitized by Google

AN ACT

Respecting the Codification of the Laws of Lower Canada relative to Civil matters and Procedure.

(Consolidated Statutes for Lower Canada, Chapter II.)

WHEREAS the laws of Lower Canada in Civil Matters, are mainly those which, at the time of the cession of the country to the British Crown, were in force in that part of France then governed by the Custom of Paris, modified by Provincial Statutes, or by the introduction of portions of the Law of England in peculiar cases; and it therefore happens, that the great body of the Laws, in that division of the Province, exist only in a language which is not the mother tongue of the inhabitants thereof of British origin, while other portions are not to be found in the mother tongue of those of French origin; and whereas the laws and Customs in force in France, at the period above mentioned, have there been altered and reduced to one general Code, so that the old laws still in force in Lower Canada are no longer re-printed or commented upon in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them; and whereas the reasons aforesaid, and the great advantages which have resulted from Codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the Codification of the Civil Laws of Lower Canada: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada enacts as follows:

1. The Governor may appoint three fit and proper persons, Barristers of Lower Canada, to be Commissioners for Codifying the Laws of that division of the Province in Civil Matters, and two fit and proper persons, being also such Barristers, to be Secretaries to the Commission, one of whom shall be a person whose mother tongue is English but who is well versed in the French language, and the other a person whose mother tongue is French but who is well versed in the English language. 20 V. c. 43, s. 1.

Digitized by Google

2. Any Judge or Judges of the Court of Queen's Bench or of the Superior Court for Lower Canada may be appointed a Commissioner or Commissioners under this Act; and if any such Judge is so appointed, the Governor may appoint any Barrister of at least ten years standing at the Bar of Lower Canada, to be and act as an Assistant Judge of either of the said Courts,—or any Judge of the Superior Court to be and act as an Assistant Judge of the Court of Queen's Bench, and a Barrister as aforesaid to supply his place as Judge of the Superior Court, as an Assistant Judge thereof,—for and during the time that the Judge, appointed a Commissioner under this Act, continues to be such Commissioner:

2. Every Assistant Judge so appointed shall, during the said time, have and exercise all the powers and authority and perform all the duties by law vested in or assigned to a Judge of the Court of which he is appointed an Assistant Judge, as if he had been appointed a Judge of such Court, and shall reside at the place to be named for that purpose from time to time by the Governor; and in case of the vacancy of the office of any such Assistant Judge, another may be appointed in his stead in like manner and with like effect. 20 V., c. 43, s. 2.

3. The said Commissioners and Secretaries shall hold their offices during pleasure, and in cases of vacancy, the Governor may appoint another or others to fill the same, and so on until the work is completed. 20 V. c. 43, s. 3.

4. The said Commissioners shall reduce into one Code, to be called the *Civil Code of Lower Canada*, those provisions of the Laws of Lower Canada which relate to Civil Matters and are of a general and permanent character, whether they relate to Commercial Cases or to those of any other nature; but they shall not include in the said Code, any of the Laws relating to the Seigniorial or Feudal Tenure. 20 V. c. 43, s. 4.

5. The said Commissioners shall reduce into another Code, to be called the *Code of Civil Procedure of Lower Canada*, those provisions of the Laws of Lower Canada which relate to Procedure in Civil Matters and Cases, and are of a general and permanent character. 20 V. c. 43, s. 5.

6. In framing the said Codes, the said Commissioners shall

Digitized by Google

embody therein such provisions only as they hold to be then actually in force, and they shall give the authorities on which they believe them to be so; they may suggest such amendments as they think desirable, but shall state such amendments separately and distinctly, with the reasons on which they are founded. 20 V. c. 43, s. 6.

7. The said Codes shall be framed upon the same general plan, and shall contain, as nearly as may be found convenient, the like amount of detail upon each subject, as the French Codes known as the *Code Civil*, the *Code de Commerce*, and the *Code de Procédure Civile*. 20 V. ch. 43, s. 7.

8. The Commissioners shall, from time to time, report to the Governor their proceedings and the progress of the work entrusted to them, and shall, in all matters not expressly provided for by this Act, be guided by the instructions they receive from the Governor; and whenever they think any section or division of the work sufficiently advanced for the purpose, they shall cause the same to be printed, and transmit a sufficient number of printed copies thereof with their Report to the Governor:

2. And if the Governor in Council thinks it advisable, he shall cause one or more of such copies to be transmitted to each of the Judges of the Court of Queen's Bench and Superior Court for Lower Canada, with a request that he will return the same, with his remarks thereon, by a day to be named in the letter containing such request. *Ibid*, s. 8.

9. Each of the said Judges shall examine the portion of the Commissioners' work so submitted to him, and return the same by the day named as aforesaid, with his remarks, and he shall more especially examine carefully that part of the work purporting to state the Law then in force, and report distinctly his opinion, whether the Law as it then stands is correctly stated therein, and in what paragraph or paragraphs (if any) it is incorrectly stated, with his reasons and authorities, and a draft of the amendments which ought in his opinion to be made in such paragraph or paragraphs, in order that the Law may be correctly stated therein. 20 V. c. 43, s. 9.

10. The Judges or any of them may, in their Report on any portion of the said work referred to them, make suggestions for the

Digitized by Google

amendment of the Law contained in such portion, with the reasons on which such suggestions are founded. 20 V. c. 43, s. 10.

11. At any time when any portion of the said work is before the Judges for their report, they or any of them may confer with the Commissioners or any of them, touching the same ; and the Commissioners shall, in any such conference, give all such information and explanation as it is in their power to afford and as the Judges may require, relative to any statement of the Law as it then stands, or any suggestion for its amendment, which the Commissioners have made in such portion of their work as aforesaid. 20 V. c. 43, s. 11.

12. The reports of the Judges shall be communicated to the Commissioners, who shall make such corrections in their work as they find advisable after having taken into consideration the reports and suggestions of the Judges ; but if any of the Judges do not send in their reports by the day named for that purpose, this shall not prevent the Codes from being completed and submitted to the Legislature as hereinafter provided. *Ibid*, s. 12.

13. The Commissioners shall, from time to time, incorporate with the proper portions of the said Codes, such amendments of the actual Law, as the Governor in Council thinks it right to recommend for adoption by the Legislature, after considering the reports of the Commissioners, and those of the Judges, if any; but such amendments shall be carefully distinguished from the actual Law. *Ibid*, s. 13.

14. When the said Codes, or either of them, are completed, with such amendments as last mentioned, printed copies thereof and of the Reports of the Commissioners, and of the Judges if any, shall be laid before the Legislature, in order that such Code or Codes may be made Law by enactment ; and if it is found advisable that either of the said Codes be completed and submitted to the Legislature before the other, the *Civil Code of Lower Canada*, shall be the first so completed and submitted:

2. Either House may propose any amendments to either Code, but such amendments shall be proposed by resolutions which may be passed by one House and sent to the other for its concurrence, and shall be subject to amendment by the other, and to be otherwise dealt with as a Bill might be, until finally agreed to by both Houses, and

Digitized by Google

shall then be communicated to the Commissionners, who shall, with all possible despach, incorporate the substance of the amendments so agreed to, with the proper Code, which may then be passed as a Bill, at the same or any future session. *Ibid.*, s. 14.

15. The said Codes and the Reports of the Commissioners, shall be framed and made in the French and English languages, and the two texts, when printed, shall stand side by side. *Ibid.*, s. 15.

16. Any two of the Commissioners may make any report or do any other thing which the Commissioners are hereby empowered to do; saving the right of the third Commissioner, if so advised, to make a separate report or enter his dissent and the reasons thereof in the minutes of the proceedings of the Commission.—20 V., c. 43, s. 16.

17. The Commissioners shall be remunerated for their services at such rate as the Governor in Council shall determine, not exceeding sixteen dollars per diem to each Commissioner while employed in the performance of his duties, nor five thousand dollars per annum to any Commissioner; and the said Secretaries shall be remunerated for their services at such rate note xceeding three thousand four hundred dollars per annum, as the Governor in Council shall determine, but the said Secretaries shall give their whole time to the duties of their office. *Ibid.*, s. 17.

18. If any Judge of the Court of Queen's Bench or Superior Court for Lower Canada is appointed such Commissioner as aforesaid, he shall, while acting as such, receive no remuneration as Commissioner except the excess (if any) of the remuneration of a Commissionner over his salary as Judge; and any Assistant Judge to be appointed to supply the place of any such Judge while acting as Commissionner, shall receive a salary to be fixed by the Governor in Council, but not to exceed the highest salary of a Puisné Judge of the Court to which he is appointed; so that the charge upon the Province shall not be increased by the appointment of a Judge or Judges as Commissionners. *Ibid.*, s. 18.

19. The Commissioners shall hold their meetings at such place as shall be appointed by the Governor, and the Secretaries shall keep minutes of the proceedings at such meetings.—20 V. c. 43, s. 19.

Digitized by Google

20. The remuneration to the Commissioners and Secretaries, with such expenses as may be incurred by them for travelling expenses, printing, stationery and other things necessary to the due performance of their duties under this Act, shall be paid by warrant of the Governor, out of the Consolidated Revenue Fund, as shall also the rent of their place of meeting, if such place be not in any public building. *Ibid.*, s. 20.

21. All moneys expended under this Act shall be accounted for to Her Majesty and to the Legislature, in the manner provided by Law. *Ibid.*, s. 21.

AN ACT

Respecting the Civil Code of Lower Canada.

(29 Vict., Chap. 41.)

WHEREAS the Commissioners appointed under the second Chapter of the Consolidated Statutes for Lower Canada, to codify the Laws of that division of the Province in Civil Matters, have completed that portion of their work mentioned in the said Act as the *Civil Code of Lower Canada*, embodying therein such provisions only as they hold to be now actually in force, and giving the authorities on which they believe them to be so, and have suggested such amendments as they think desirable, stating such amendments separately and distinctly, with the reasons on which they are founded ; and have in all respects complied with the requirements of the said Act as regards the said Code and amendments ; and whereas the said Code with the amendments suggested by the said Commissioners, has, by command of the Governor, been laid before the Legislature, in order that the said Code, with such amendments as may be adopted by the Legislature, may be made law by enactment ; and whereas such of the amendments suggested by the commissioners, and such other amendments, as are mentioned in the resolutions contained in the Schedule hereunto annexed, have been finally agreed to by both Houses : Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Canada, enacts as follows

1. The printed roll attested as that of the said *Civil Code of*

Digitized by Google

Lower Canada, under the signature of His Excellency the Governor General, that of the Clerk of the Legislative Council, and that of the Clerk of the Legislative Assembly, and deposited in the office of the Clerk of the Legislative Council, shall be held to be the original thereof reported by the Commissioners as containing the existing law without amendment; but the marginal notes, and the references to existing laws or authorities at the foot of the several articles of the said Code, shall form no part thereof, and shall be held to have been inserted for convenience of reference only, and may be omitted or corrected.

2. The Commissioners under the Act mentioned in the preamble of this Act, shall incorporate the amendments mentioned in the resolutions contained in the Schedule to this Act with the said Civil Code as contained in the roll aforesaid, adapting their form and language (when necessary) to those of the said Code, but without changing their effect, inserting them in their proper places, and striking out of the said Code any part thereof inconsistent with the said amendments.

3. The Governor may also select any Acts and parts of Acts passed during the session now last past and the present session, which he may deem it advisable to be incorporated with the said Code, and may cause them to be so incorporated by the said Commissioners, in the manner hereinbefore prescribed with respect to the amendments above mentioned, striking out of the Code or amendments any part thereof inconsistent with the Acts or parts of Acts incorporated therewith.

4. The Commissioners may alter the numbering of the Titles and Articles of the said Code or their order, if need be, and make the necessary changes in any reference from one part of the Code to another, and may correct any misprint or error whether of commission or omission, or any contradiction or ambiguity in the original Roll, but without changing its effect.

5. So soon as the said work of incorporation and correction shall have been completed, the said Commissioners shall cause the Code to be reprinted as amended and corrected, carefully distinguishing in such reprint the substantive amendments and additions

Digitized by Google

made in or to the original Roll, and shall submit the same to the Governor, who may cause a correct printed Roll thereof, attested under his signature and countersigned by the Provincial Secretary, to be deposited in the office of the Clerk of the Legislative Council, which Roll shall be held to be the original thereof; any such marginal notes or references thereon as are mentioned in Section one, being held to form no part thereof, but to be inserted for convenience of reference only.

6. The Governor in Council may after such deposit of the Roll last mentioned, declare by Proclamation the day on, from and after which the said Code as contained in the said Roll shall come into force and have effect as law, by the designation of "The Civil Code of Lower Canada," and upon, from and after such day the said Code shall be in force accordingly.

7. The laws relating to the distribution of the printed copies of the Statutes shall not apply to the said Code, which shall be distributed in such numbers and to such persons only as the Governor in Council may direct.

8. This Act and the Proclamation mentioned in section six, shall be printed with the copies of the said Code printed for distribution as aforesaid.

9. So much of the Act cited in the Preamble as may be inconsistent with this Act is hereby repealed.

Digitized by Google

PROVINCE OF CANADA. } MONCK.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, QUEEN, Defender of the Faith, &c., &c., &c.

To all to whom these presents shall come, or whom the same may in any wise concern—GREETING:

GEO. ET. CARTIER, *Atty Genl.* WHEREAS in and by a certain Act of the Legislature of the Province of Canada, passed in the twenty-ninth year of Our Reign, intituled; "An Act respecting the Civil Code of Lower Canada," it is amongst other things in effect enacted that the printed roll attested as that of the said *Civil Code of Lower Canada*, under the signature of His Excellency the Governor General, that of the Clerk of the Legislative Council, and that of the Clerk of the Legislative Assembly, and deposited in the office of the Clerk of the Legislative Council, shall be held to be the original thereof reported by the Commissioners as containing the existing Law without amendment; but the marginal notes, and the references to existing laws or authorities at the foot of the several articles of the said Code, shall form no part thereof, and shall be held to have been inserted for convenience of reference only, and may be omitted or corrected; that the Commissioners appointed under the second chapter of the Consolidated Statutes for Lower Canada, to codify the Laws of that Division of the Province in civil matters shall incorporate the amendments mentioned in the resolutions contained in the Schedule to that Act with the said Civil Code as contained in the roll aforesaid, adapting their form and language (when necessary) to those of the said Code, but without changing their effect, inserting

Digitized by Google

them in their proper places, and striking out of the said Code any part thereof inconsistent with the said amendments; that the Governor may also select any Acts and parts of Acts passed during the session then last past, and that session, which he may deem it advisable to be incorporated with the said Code, and may cause them to be so incorporated by the said Commissioners, in the manner therein before prescribed with respect to the amendments above mentioned, striking out of the Code or amendments any part thereof inconsistent with the Acts or parts of Acts incorporated therewith; that the Commissioners may alter the numbering of the Titles and Articles of the said Code or their order, if need be, and make the necessary changes in any reference from one part of the Code to another, and may correct any misprint or error whether of commission or omission, or any contradiction or ambiguity in the original Roll, but without changing its effect; that so soon as the said work of incorporation and correction shall have been completed, the said Commissioners shall cause the Code to be reprinted as amended and corrected, carefully distinguishing in such reprint the substantive amendments and additions made in or to the original Roll, and shall submit the same to the Governor, who may cause a correct printed Roll thereof, attested under his signature and countersigned by the Provincial Secretary, to be deposited in the office of the Clerk of the Legislative Council, which Roll shall be held to be the original thereof; any such marginal notes or references thereon as are mentioned in section one, being held to form no part thereof, but to be inserted for convenience of reference only; and that the Governor in Council may after such deposit of the Roll last mentioned, declare by Proclamation the day on, from and after which the said Code as contained in the said Roll shall come into force and have effect as law, by the designation of "The Civil Code of Lower Canada," and upon, from and after such day the said Code shall be in force accordingly. AND WHEREAS the said Commissioners have incorporated the amendments mentioned in the resolutions contained in the schedule to the said Act with the said Civil Code as contained in the roll aforesaid, having adapted their form and language to those of the said Code but without having changed their effect, having inserted them in their proper places, and having struck out of the said Code any part thereof inconsistent with those amendments; AND WHEREAS the said Commissioners have been duly directed to incorporate, and have incorporated with the said Code such Acts and parts of Acts, passed during the last two sessions of the

Digitized by Google

Legislature of Canada, as were deemed advisable to be incorporated therewith, and have struck out of the said Code and amendments any part thereof inconsistent with such Acts or parts of Acts so incorporated; AND WHEREAS the said Commissioners have altered the numbering of the Titles and Articles of the said Code and have made the necessary changes in any reference from one part of the Code to another, and have corrected any misprint or error, whether of commission or omission in the original Roll, but without changing its effect; AND WHEREAS so soon as the said work of incorporation and correction was completed, the said Commissioners have caused the Code to be reprinted as amended and corrected, having carefully distinguished in such reprint the substantive amendments and additions made in or to the original Roll and have submitted the same to the Governor of Our said Province of Canada; AND WHEREAS all the provisions of the first five sections of the above Act have been duly carried into effect; AND WHEREAS CHARLES STANLEY VISCOUNT MONCK, being Governor General of Our said Province of Canada, after the provisions contained in the first five sections of the said Act, had been as above and in every other particular duly carried into effect, hath caused a correct printed roll of the said Civil Code, attested under his signature and countersigned by the Provincial Secretary, to be deposited in the office of the Clerk of the Legislative Council; AND WHEREAS Our said Governor General of Our said Province of Canada, after such deposit of the said printed roll of the said Civil Code, hath, by and with the advice and consent of Our Executive Council, for the said Province, fixed the FIRST day of AUGUST next, as the day on, from and after which the said Code as contained in the said Roll shall come into force and have effect as law, by the designation of "The Civil Code of Lower Canada;" NOW KNOW YE, that by and with the advice of Our Executive Council for the said Province of Canada, We do, by this Our Royal Proclamation, declare that on, from and after the FIRST day of the month of AUGUST next, the said last mentioned Roll attested under the signature of Our said Governor General of Our said Province of Canada, countersigned by the Provincial Secretary and deposited in the office of the Clerk of the Legislative Council of the said Province as aforesaid, shall come into force and have effect as law by the designation of "The Civil Code of Lower Canada;" Of all which Our loving subjects of Our said Province, and all others whom these presents may concern, are hereby required to take notice, and to govern themselves accordingly.

Digitized by Google

IN TESTIMONY WHEREOF, We have caused these Our Letters to be made Patent, and the Great Seal of Our said Province of Canada to be hereunto affixed: WITNESS, Our Right Trusty and Well-Beloved Cousin the Right Honorable CHARLES STANLEY VISCOUNT MONCK, Baron Monck of Ballytrammon, in the County of Wexford, Governor General of British North America, and Captain General and Governor in Chief in and over Our Provinces of Canada, Nova Scotia, New Brunswick, and the Island of Prince Edward, and Vice Admiral of the same, &c., &c., &c. At Our Government House, in Our CITY OF OTTAWA, in Our said Province of Canada, this TWENTY-SIXTH day of MAY, in the year of Our Lord, one thousand eight hundred and sixty-six, and in the Twenty-ninth year of Our Reign.

By Command,

WM. McDOUGALL, *Secretary.*

Digitized by Google

GENERAL INDEX TO CIVIL CODE.

VOLS. I AND II.

VOL. I.

ARTS

PRELIMINARY TITLE.—OF THE PROMULGATION, DISTRIBUTION, EFFECT, APPLICATION, INTERPRETATION AND EXECUTION OF THE LAWS IN GENERAL..... 1

BOOK FIRST.

OF PERSONS.

TITLE FIRST.—OF THE ENJOYMENT AND LOSS OF CIVIL RIGHTS.

CHAP. I.—OF THE ENJOYMENT OF CIVIL RIGHTS..... 18
CHAP. II.—OF THE LOSS OF CIVIL RIGHTS..... 30
Sec. I.—Of civil death..... 31
" II.—Of the effects of civil death..... 35

TITLE SECOND.—OF ACTS OF CIVIL STATUS.

CHAP. I.—GENERAL PROVISIONS..... 39
" II.—OF ACTS OF BIRTH..... 54
" III.—OF ACTS OF MARRIAGE..... 57
" IV.—OF ACTS OF BURIAL..... 66
" V.—OF ACTS OF RELIGIOUS PROFESSION..... 70
" VI.—OF THE RECTIFICATION OF ACTS AND REGISTERS OF CIVIL STATUS..... 75

TITLE THIRD.—OF DOMICILE. 79

Digitized by Google

ARTS.

TITLE FOURTH.—Of absentees.

General provision..... 86
Chap. I.—Of the curatorship to absentees..... 87
" II.—Of the provisional possession of the heirs of absentees..... 93
" III.—Of the effect of absence in relation to contingent rights which may accrue to the absentee. 104
" IV.—Of the effects of absence in relation to marriage..... 108
" V.—Of the care of minor children of a father who has disappeared..... 113

TITLE FIFTH.—Of marriage.

Chap. I.—Of the qualities and conditions necessary for contracting marriage..... 115
" II.—Of the formalities relating to the solemnization of marriage..... 128
" III.—Of oppositions to marriage..... 136
" IV.—Of actions for annulling marriage..... 148
" V.—Of the obligations arising from marriage..... 165
" VI.—Of the respective rights and duties of husband and wife..... 173
" VII.—Of the dissolution of marriage..... 185

TITLE SIXTH.—Of separation from bed and board.

Chap. I.—Of the causes of separation from bed and board..... 186
" II.—Of the formalities of the action for separation from bed and board..... 192
" III.—Of the provisional measures to which the action for separation from bed and board may give rise..... 200
" IV.—Of the effects of separation from bed and board..... 206

TITLE SEVENTH.—Of filiation.

Chap. I.—Of the filiation of children who are legitimate or conceived during marriage..... 218
" II.—Of the evidence of filiation of legitimate children..... 228
" III.—Of illegitimate children..... 237

TITLE EIGHTH.—Of paternal authority. 242

Digitized by Google

ARTS.

TITLE NINTH.—OF MINORITY, TUTORSHIP AND EMANCIPATION.

CHAP. I.—OF MINORITY 246
CHAP. II.—OF TUTORSHIP.
Sec. I.—Of the appointment of tutors 249
" II.—Of subrogate tutors 267
" III.—Of the causes which exempt from tutorship 272
" IV.—Of incapacity, exclusion and removal from tutorship. 282
" V.—Of the administration of tutors 290
" VI.—Of the account of tutorship 308
CHAP. III.—OF EMANCIPATION 314

TITLE TENTH.—OF MAJORITY, INTERDICTION, CURATORSHIP AND OF JUDICIAL ADVISERS.

CHAP. I.—OF MAJORITY 324
" II.—OF INTERDICTION 325
" III.—OF CURATORSHIP 337
" IV.—OF JUDICIAL ADVISERS 349

TITLE ELEVENTH.—OF CORPORATIONS.

CHAP. I.—OF THE NATURE AND CREATION OF CORPORATIONS, AND OF THEIR DIFFERENT KINDS 352
CHAP. II.—OF THE RIGHTS, PRIVILEGES AND DISABILITIES OF CORPORATIONS.
Sec. I.—Of the rights of corporations 357
" II.—Of the privileges of corporations 362
" III.—Of the disabilities of corporations 364
CHAP. III.—OF THE DISSOLUTION OF CORPORATIONS AND THE LIQUIDATION OF THEIR AFFAIRS.
Sec. I.—Of the dissolution of corporations 368
" II.—Of the liquidation of the affairs of dissolvéd corporations 371

BOOK SECOND

OF PROPERTY, OF OWNERSHIP AND OF ITS DIFFERENT MODIFICATIONS.

TITLE FIRST.—OF THE DISTINCTION OF THINGS 374

CHAP. I.—OF IMMOVEABLES 375

Digitized by Google

ARTS

CHAP. II.—OF MOVEABLES 383
" III.—OF PROPERTY IN ITS RELATIONS WITH THOSE TO WHOM IT BELONGS OR WHO POSSESS IT 399

TITLE SECOND.—OF OWNERSHIP.

CHAP. I.—OF THE RIGHT OF ACCESSION OVER WHAT IS PRODUCED BY A THING 409
CHAP. II.—OF THE RIGHT OF ACCESSION OVER WHAT BECOMES UNITED AND INCORPORATED WITH A THING 413
Sec. I.—Of the right of accession in relation to immoveable property 414
" II.—Of the right of accession in relation to moveable property 429

TITLE THIRD.—OF USUFRUCT, USE AND HABITATION.

CHAP. I.—OF USUFRUCT 443
Sec. I.—Of the rights of the usufructuary 447
" II.—Of the obligations of the usufructuary 463
" III.—Of the termination of usufruct 479
CHAP. II.—OF USE AND HABITATION 487

TITLE FOURTH.—OF REAL SERVITUDES.

General provisions 499
CHAP. I.—OF SERVITUDES WHICH ARISE FROM THE SITUATION OF PROPERTY 501
CHAP. II.—OF SERVITUDES ESTABLISHED BY LAW 506
Sec. I.—Of division walls and ditches, and of clearance 510
" II.—Of the distance and of the intermediate works required for certain structures 532
" III.—Of view on the property of a neighbour 533
" IV.—Of the eaves of roofs 539
" V.—Of the right of way 540
CHAP. III.—OF SERVITUDES ESTABLISHED BY THE ACT OF MAN.
Sec. I.—Of the different kinds of servitudes which may be established on property 545
" II.—How servitudes are established 549
" III.—Of the rights of the proprietor of the land to which the servitude is due 553
" IV.—Of the extinction of servitudes 559

TITLE FIFTH.—OF EMPHYTEUSIS.

Sec. I.—General provisions 567
" II.—Of the rights and obligations of the lessor and of the lessee 573
' III.—Of the termination of emphyteusis 579

Digitized by Google

BOOK THIRD.

OF THE ACQUISITION AND EXERCISE OF RIGHTS OF PROPERTY.

ARTS.

General provisions 583

TITLE FIRST.—Of successions.

General provisions 596
Chap. I.—Of the opening of successions and of the seizin of heirs.
Sec. I.—Of the opening of successions 600
" II.—Of the seizin of heirs 606
Chap. II.—Of the qualities requisite to inherit 608
Chap. III.—Of the different orders of succession.
Sec. I.—General provisions 614
" II.—Of representation 619
" III.—Of successions devolving to descendants 625
" IV.—Of successions devolving to ascendants 626
" V.—Of collateral successions 631
" VI.—Of irregular successions 636
Chap. IV.—Of acceptance and renunciation of successions.
Sec. I.—Of acceptance of successions 641
" II.—Of renunciation of successions 651
" III.—Of the formalities of acceptance, of benefit of inventory and its effects, and of the obligations of the benificiary heir 660
" IV.—Of vacant successions 684
Chap. V.—Of partition and returns.
Sec. I.—Of the action of partition and its form 689
" II.—Of returns 712
" III.—Of payment of debts 735
" IV.—Of the effects of partition and of the warranty of shares 746
" V.—Of rescission in matters of partition 751

TITLE SECOND—.Of gifts inter vivos and by will.

Chap. I.—General provisions 754
Chap. II.—Of gifts inter vivos
Sec. I.—Of the capacity to give and to receive by gift *inter vivos* 761
" II.—Of the form of gifts and of their acceptance 776
" III.—Of the effect of gifts 795

Digitized by Google

ARTS.

Sec. IV.—Of registration as regards gifts *inter vivos* in particular 804
" V.—Of the revocation of gifts 811
" VI.—Of gifts by contract of marriage, whether of present property or made in contemplation of death 817

CHAP. III.—OF WILLS.

Sec. I.—Of the capacity to give and to receive by will 831
" II.—Of the form of wills 840
" III.—Of the probate and proof of wills 856
" IV.—Of legacies .....
§ 1. Of legacies in general 863
§ 2. Of universal legacies and legacies by general title .. 873
§ 3. Of legacies by particular title 880
§ 4. Of the seizin of legatees 891
" V.—Of the revocation and lapse of wills and legacies .. 892
" VI.—Of testamentary executors 905

CHAP. IV.—OF SUBSTITUTIONS.

Sec. I.—Rules concerning the nature and form of substitutions 925
" II.—Of the registration of substitutions 938
" III.—Of substitutions before their opening 944
" IV.—Of the opening of substitutions and the delivering over of the property 961
" V.—Of the prohibition to alienate 968

TITLE THIRD.—OF OBLIGATIONS.

General provisions 982

CHAP. I.—OF CONTRACTS.

Sec. I.—Of the requisites to the validity of contracts 984
§ 1. Of the legal capacity to contract 985
§ 2. Of consent 988
§ 3. Of the cause or consideration of contracts 989
§ 4. Of the object of contracts ..... ——
Sec. II.—Of causes of nullity in contracts 991
§ 1. Of error 992
§ 2. Of fraud 993
§ 3. Of violence and fear 994
§ 4. Of lesion 1001
Sec. III.—Of the interpretation of contracts 1013
" IV.—Of the effect of contracts 1022
" V.—Of the effect of contracts with regard to third persons 1028
" VI.—Of the avoidance of contracts and payments made in fraud of creditors 1032

CHAP. II.—OF QUASI-CONTRACTS 1041

Sec. I.—Of the quasi-contract *Negotiorum gestio* 1043

Digitized by Google

ARTS.

Sec. II.—Of the quasi-contract resulting from the reception of a thing not due 1047
CHAP. III.—OF OFFENCES AND QUASI-OFFENCES 1053
CHAP. IV.—OF OBLIGATIONS WHICH RESULT FROM THE OPERATION OF LAW SOLELY 1057
CHAP. V.—OF THE OBJECT OF OBLIGATIONS 1058
CHAP. VI.—OF THE EFFECT OF OBLIGATIONS.
Sec. I.—General provisions 1063
" II.—Of defaults 1067
" III.—Of the damages resulting from the inexecution of obligations 1070
CHAP. VII.—OF DIFFERENT KINDS OF OBLIGATIONS.
Sec. I.—Of conditional obligations 1079
" II.—Of obligations with a term 1089
" III.—Of alternative obligations 1093
" IV.—Of joint and several obligations.
§ 1. Of joint and several interest among creditors 1100
§ 2. Of debtors jointly and severally obliged 1103
Sec. V.—Of divisible and indivisible obligations 1121
" VI.—Of obligations with a penal clause 1131
CHAP. VIII.—OF THE EXTINCTION OF OBLIGATIONS.
Sec. I.—General provisions 1138
" II.—Of payment
§ 1. General provisions 1139
§ 2. Of payment with subrogation 1154
§ 3. Of the imputation of payments 1158
§ 4. Of tender and deposit 1162
Sec. III.—Of novation 1169
" IV.—Of release 1181
" V.—Of compensation 1187
" VI.—Of confusion 1198
" VII.—Of the performance of the obligation becoming impossible 1200
CHAP. IX.—OF PROOF.
Sec. I.—General provisions 1203
Sec. II.—Of proof by writings.
§ 1. Of authentic writings 1207
§ 2. Of copies of authentic writings 1215
§ 3. Of certain writings executed out of Lower Canada 1220
§ 4. Of private writings 1221
Sec. III.—Of testimony 1230
" IV.—Of presumptions 1238
" V.—Of admissions 1243
" VI.—Of the oaths of parties 1246
§ 1. Of the decisory oath 1247
§ 2. Of the oath put officially 1254

Digitized by Google

ARTS.

TITLE FOURTH.—Of marriage covenants and of the effect of marriage upon the property of the consorts.

Chap. I.—General provisions 1257
Chap. II.—Of community of property 1268
Sec. I.—Of legal community 1270
§ 1. What things compose the assets and liabilities of the community 1272
§ 2. Of the administration of the community and of the effect of the acts of either consort, in relation to the conjugal association 1292
§ 3. Of the dissolution of the community and of its continuation in certain cases .....
I. Of the dissolution of the community 1310
II. Of the continuation of the community 1323
§ 4. Of the acceptance of the community and of the renunciation that may be made thereof with the conditions relative thereto 1338
§ 5. Of the partition of the community 1354
I. Of the partition of the assets 1355
II. Of the liabilities of the community and of the contribution to the debts 1369
§ 6. Of renunciation of the community and of its effects 1379
Sec. II.—Of conventional community and of the most ordinary conditions which may modify or even exclude legal community 1384
§ 1. Of the clause of realization 1385
§ 2. Of the clause of mobilization 1390
§ 3. Of the clause of separation of debts 1396
§ 4. Of the right given to the wife of taking back free and clear what she brought into the community. 1400
§ 5. Of conventional preciput 1401
§ 6. Of the clauses by which unequal shares in the community are assigned to the consorts 1406
§ 7. Of community by general title 1412
Provisions common to the articles of this section 1413
§ 8. Of covenants excluding community 1415
I. Of the clause declaring that the consorts marry without community 1416
II. Of the clause of separation of property 1422
Chap. III.—Of dower.
Sec. I.—General provisions 1426
" II.—Particular provisions as to the dower of the wife.. 1450
" III.—Particular provisions as to the dower of children... 1466

TITLE FIFTH.—Of sale.

Chap. I.—General provisions 1472

Digitized by Google

ARTS.

CHAP. II.—OF THE CAPACITY TO BUY OR SELL 1482
" III.—OF THINGS WHICH MAY BE SOLD 1486
CHAP. IV.—OF THE OBLIGATIONS OF THE SELLER.
Sec. I.—General provisions 1491
" II.—Of delivery 1492
" III.—Of warranty.—General provisions 1506
§ 1. Of warranty against eviction 1508
§ 2. Of warranty against latent defects 1522
CHAP. V.—OF THE OBLIGATIONS OF THE BUYER 1532
CHAP. VI.—OF THE DISSOLUTION AND OF THE ANNULLING OF THE CONTRACT OF SALE 1545
Sec. I.—Of the right of redemption 1546
" II.—Of the annulling of sale for cause of lesion 1561
CHAP. VII.—OF SALE BY LICITATION 1562
" VIII.—OF SALE BY AUCTION 1564
" IX.—OF THE SALE OF REGISTERED VESSELS 1569
" X.—OF THE SALE OF DEBTS AND OTHER INCORPOREAL THINGS.
Sec. I.—Of the sale of debts and rights of action 1570
" II.—Of the sale of successions 1579
" III.—Of the sale of litigious rights 1582
CHAP. XI.—OF FORCED SALES AND TRANSFERS RESEMBLING SALE.
Sec. I.—Of forced sales 1585
" II.—Of the giving in payment 1592
" III.—Of alienation for rent 1593

TITLE SIXTH.—OF EXCHANGE 1596

VOL. II.

TITLE SEVENTH.—OF LEASE AND HIRE.

CHAP. I.—GENERAL PROVISIONS 1600
CHAP. II.—OF THE LEASE OR HIRE OF THINGS.
Sec. I.—General provisions 1605
" II.—Of the obligations and rights of the lessor 1612
" III.—Of the obligations and rights of the lessee 1626
" IV.—Rules particular to the lease or hire of houses 1642
" V.—Rules particular to the lease and hire of farms and rural estates 1646
" VI.—Of the termination of the lease or hire of things ... 1655
CHAP. III.—OF THE LEASE AND HIRE OF WORK.
Sec. I.—General provisions 1666
" II.—Of the lease and hire of the personal service of workmen, servants, and others 1667

Digitized by Google

ARTS.
Sec. III.—Of carriers 1672
" IV.—Of work by estimate and contract 1683
CHAP. IV.—OF THE LEASE OF CATTLE ON SHARES 1698

TITLE EIGHTH.—OF MANDATE.

CHAP. I.—General provisions 1701
CHAP. II.—OF THE OBLIGATIONS OF THE MANDATARY.
Sec. I.—Of the obligations of the mandatary toward the mandator 1709
" II.—Of the obligations of the mandatary toward third persons 1715
CHAP. III.—OF THE OBLIGATIONS OF THE MANDATOR.
Sec. I.—Of the obligations of the mandator toward the mandatary 1720
" II.—Of the obligations of the mandator toward third persons 1727
CHAP. IV.—OF ADVOCATES, ATTORNEYS AND NOTARIES 1732
CHAP. V.—OF BROKERS, FACTORS AND OTHER COMMERCIAL AGENTS 1735
CHAP. VI.—OF THE TERMINATION OF MANDATE 1755

TITLE NINTH.—OF LOAN.

General provisions 1762
CHAP. I.—OF LOAN FOR USE (*commodatum*).
Sec. I.—General provisions 1763
" II.—Of the obligations of the borrower 1766
" III.—Of the obligations of the lender 1773
CHAP. II.—OF LOAN FOR CONSUMPTION (*mutuum*).
Sec. I.—General provisions 1777
" II.—Of the obligations of the lender 1781
" III.—Of the obligations of the borrower 1782
CHAP. III.—OF LOAN UPON INTEREST 1785
CHAP. IV.—OF CONSTITUTION OF RENT 1787

TITLE TENTH.—OF DEPOSIT 1794

CHAP. I.—OF SIMPLE DEPOSIT.
Sec. I.—General provisions 1795
" II.—Of voluntary deposit 1799
" III.—Of the obligations of the depositary 1802
" IV.—Of the obligations of the depositor 1812
" V.—Of necessary deposit 1813
CHAP. II.—OF SEQUESTRATION 1817
Sec. I.—Of conventional sequestration 1818
" II.—Of judicial sequestration 1823

Digitized by Google

TITLE ELEVENTH.—Of partnership.

ARTS.

Chap. I.—General provisions 1830
" II.—Of the obligations and rights of partners among themselves 1839
" III.—Of the obligations of partners toward third persons 1854
Chap. IV.—Of the different kinds of partnership 1857
Sec. I.—Of universal partnerships 1858
" II.—Of particular partnerships 1862
" III.—Of commercial partnerships 1863
§ 1. Of general partnerships 1865
§ 2. Of anonymous partnerships 1870
§ 3. Of partnerships *en commandite* or limited partnerships 1871
§ 4. Of joint-stock companies 1889
Chap. V.—Of the dissolution of partnership 1892
" VI.—Of the effects of dissolution 1897

TITLE TWELFTH.—Of life-rents.

Chap. I.—General provisions 1901
Chap. II.—Of the effects of the contract 1907

TITLE THIRTEENTH.—Of transaction 1918

TITLE FOURTEENTH.—Of gaming contracts and bets 1927

TITLE FIFTEENTH.—Of suretyship.

Chap. I.—Of the nature, division and extent of suretyship 1929
Chap. II.—Of the effect of suretyship.
Sec. I.—Of the effect of suretyship between the creditor and the surety 1941
" II.—Of the effect of suretyship between the debtor and the surety 1948
" III.—Of the effect of suretyship between co-sureties 1955
Chap. III.—Of the extinction of suretyship 1956
" IV.—Of legal and judicial suretyship 1962

TITLE SIXTEENTH.—Of pledge 1966

Chap. I.—Of the pledge of immoveables 1967
" II.—Of pawning 1968

Digitized by Google

TITLE SEVENTEENTH.—Of privileges and hypothecs.

ARTS.

Chap. I.—Preliminary provisions 1980
Chap. II.—Of privileges.
General provisions 1983
Sec. I.—Of privileges upon moveable property 1993
" II.—Of privileges upon immoveables 2009
" III.—How privileges upon immoveables are retained 2015
Chap. III.—Of hypothecs.
Sec. I.—General provisions 2016
" II.—Of legal hypothecs 2024
§ 1. Legal hypothec of married women 2029
§ 2. Legal hypothec of minors and interdicted persons. 2030
§ 3. Legal hypothec of the crown 2032
§ 4. Legal hypothec of mutual insurance companies 2033
Sec. III.—Of judicial hypothec 2034
" IV.—Of conventional hypothec 2037
" V.—Of the order in which hypothecs rank among themselves 2047
Chap. IV.—Of the effect of privileges and hypothecs with regard to the debtor or other holder. 2053
Sec. I.—Of the hypothecary action 2058
§ 1. Of the exception of discussion 2066
§ 2. Of the exception of warranty 2068
§ 3. Of the exception of subrogation (*cedendarum actionum*) 2070
§ 4. Of the exception resulting from expenditures..... 2072
§ 5. Of the exception resulting from a privileged claim or a prior hypothec 2073
Sec. II.—Of the effect of the hypothecary action 2074
Chap. V.—Of the extinction of privileges and hypothecs. 2081

TITLE EIGHTEENTH.—Of registration of real rights.

Chap. I.—General provisions 2082
" II.—Rules particular to different titles by which real rights are acquired 2098
" III.—Of the order of preference of real rights. 2130
Chap. IV.—Of the mode and formalities of registration ... 2131
Sec. I.—Of registration at length 2132
" II.—Of registration by memorial 2136
Chap. V.—Of the cancelling of registrations of real rights 2148
Chap. VI.—Of the organisation of registry offices.
Sec. I.—Of registry offices and the registers 2158

Digitized by Google

ARTS.

Sec. II.—Of the official plans and books of reference and provisions concerning the same 2166
" III.—Of the publicity of the registers 2177

TITLE NINETEENTH.—OF PRESCRIPTION.

CHAP. I.—GENERAL PROVISIONS 2183
" II.—OF POSSESSION 2192
" III.—OF THE CAUSES WHICH HINDER PRESCRIPTION, AND SPECIALLY OF PRECARIOUS OCCUPATION AND OF SUBSTITUTIONS 2201
CHAP. IV.—OF CERTAIN THINGS IMPRESCRIPTIBLE AND OF PRIVILEGED PRESCRIPTIONS 2211
CHAP. V.—OF THE CAUSES WHICH INTERRUPT OR SUSPEND PRESCRIPTION.
Sec. I.—Of the causes which interrupt prescription 2222
" II.—Of the causes which suspend the course of prescription 2232
CHAP. VI.—OF THE TIME REQUIRED TO PRESCRIBE.
Sec. I.—General provisions 2240
" II.—Of the prescription by thirty years, of prescription of rents and interest, and of the duration of the plea of prescription 2242
" III.—Of prescription by subsequent purchasers 2251
" IV.—Of certain prescriptions by ten years 2258
" V.—Of certain short prescriptions 2260
" VI.—Transitory provisions 2270

TITLE TWENTIETH.—OF IMPRISONMENT IN CIVIL CASES 2271

BOOK FOURTH.

COMMERCIAL LAW.

General provision 2278

TITLE FIRST.—OF BILLS OF EXCHANGE, NOTES AND CHEQUES.

CHAP. I.—OF BILLS OF EXCHANGE.
Sec. I.—Of the nature and requirements of bills of exchange. 2279
" II.—Of the negociation of bills of exchange 2286
" III.—Of acceptance 2290

Digitized by Google

ARTS.

Sec. IV.—Of noting and protest for non-acceptance..... 2298
" V.—Of payment..... 2306
" VI.—Of protest for non-payment..... 2319
" VII.—Of notice of protest..... 2326
" VIII.—Of interest, commission and damages..... 2332
IX.—General provisions..... 2340
CHAP. II.—OF PROMISSORY NOTES..... 2344
" III.—OF CHEQUES..... 2349

TITLE SECOND.—OF MERCHANT SHIPPING..... 2355

CHAP. I.—OF THE REGISTRATION OF SHIPS..... 2356
" II.—OF THE TRANSFER OF REGISTERED VESSELS..... 2359
" III.—OF THE MORTGAGE AND HYPOTHECATION OF VESSELS. 2374
" IV.—OF PRIVILEGE AND MARITIME LIEN UPON VESSELS AND UPON THEIR CARGO AND FREIGHT..... 2383
" V.—OF OWNERS, MASTERS AND SEAMEN..... 2389

TITLE THIRD.—OF AFFREIGHTMENT.

CHAP. I.—GENERAL PROVISIONS..... 2407
" II.—OF CHARTER-PARTY..... 2414
" III.—OF THE CONVEYANCE OF GOODS IN A GENERAL SHIP.. 2419
" IV.—OF THE BILL OF LADING..... 2420
" V.—OF THE OBLIGATIONS OF THE OWNER OR LESSOR AND OF THE MASTER..... 2423
" VI.—OF THE OBLIGATIONS OF THE LESSEE.
Sec. I.—General provisions..... 2437
" II.—Of freight, primage, average and demurrage..... 2442

TITLE FOURTH.—OF THE CARRIAGE OF PASSENGERS IN MERCHANT VESSELS..... 2461

TITLE FIFTH.—OF INSURANCE.

CHAP. I.—GENERAL PROVISIONS.
Sec. I.—Of the nature and form of the contract..... 2468
" II.—Of representation and concealment..... 2485
" III.—Of warranties..... 2490
CHAP. II.—OF MARINE INSURANCE.
Sec. I.—General provisions..... 2492
" II.—Of the obligations of the insured..... 2499
§ 1. Of the premium..... 2500
§ 2. Of reprensentation and concealment..... 2503
§ 3. Of warranties..... 2504
Sec. III.—Of the obligations of the insurer..... 2507
" IV.—Of losses..... 2521

Digitized by Google

ARTS.
Sec. V.—Of abandonment 2538
" VI.—Of loss by average contributions 2551
CHAP. III.—OF FIRE INSURANCE 2568
" IV.—OF LIFE INSURANCE 2585

TITLE SIXTH.—OF BOTTOMRY AND RESPONDENTIA ... 2594

FINAL PROVISIONS 2613

Digitized by Google

Digitized by Google

CIVIL CODE OF LOWER CANADA,

ANNOTATED.

VOL. I.

PRELIMINARY TITLE.

OF THE PROMULGATION, DISTRIBUTION, EFFECT, APPLICATION, INTERPRETATION AND EXECUTION OF THE LAWS IN GENERAL.

1. Acts of the imperial parliament which affect Canada are deemed to be promulgated and come into force from the day on which they receive the royal assent, unless some other time is therein appointed.—1 Blackstone's Comm. pp. 102 to 107; 1 Chitty, Crim. Law, p. 638; 1 Pandectes Françaises, p. 407; Chalmers' Opinions, 158, 228, 231, 292, 511; C. N., 1. [I. 243.]

2. The acts of the provincial parliament are deemed to be promulgated:

1. If they be assented to by the governor, from the date of such assent;

2. If they be reserved, from the time at which the governor makes known, either by proclamation or by speech or message to the legislative council and assembly, that they have received the royal assent. —C. S. C., c. 5, s. 4; 1 Pandectes Françaises, 407, p. 26; C. S. L. C., c. 3, s. 1; Union Act. ss. 38, 39; C. N., 1. [I. 243.]

Amendment:—Unless other provisions be made respecting the date of its becoming executory, every statute of the province, if not reserved, becomes executory on the sixtieth day after that of its sanction, and if reserved and afterwards sanctioned, on the tenth day after that of its publication in the "Quebec Official Gazette."—Q. 49-50 Vict., cap. 95, s. 5.

Digitized by Google

DECISION :—When no time is fixed by the statute itself, an Act takes effect from its date and the date includes the whole day of its date. Accordingly, a writ of attachment issued under the Insolvent Act on the day that the Act to repeal the Insolvent Act was assented to, was held to be invalid, though the writ was, in fact, issued before the repealing Act received the assent of the Crown.—Torrance, J.—*Rickaby vs Bell*, 25 L. C. J., p. 91.

✱ **3.** Any provincial act assented to by the governor, ceases to have force and effect from the time at which it is announced, either by proclamation, or by speech or message to the legislative council and assembly, that such act has been disallowed by Her Majesty, within the two years following the reception, by one of her principal secretaries of state, of the authentic copy which has been transmitted to him of such act.—Union Act, s. 38. [I. 243.]

Amendment :—Every statute ceases to have force and effect from the day on which it is announced, either by proclamation or by speech or by message to the two Houses of the Legislature, that such statute has been disallowed within the year following the reception by the Governor General of the authentic copy which has been transmitted to him.—Q. 49-50, Vict. cap. 95, s. 6.

✱ **4.** An authentic copy of the statutes assented to by the governor or the assent to which has been published as provided in article 2, is furnished by the clerk of the legislative council to Her Majesty's printer, whose duty it is to print and cause to be distributed, to all entitled thereto, the number of copies mentioned in the list transmitted to him by the provincial secretary, after the close of each session.—C. S. C., cap. 5, s. 7. [I. 243.]

Amendment :—As soon as any statute is assented to, or, if it has been reserved as soon as the assent thereto has been signified, the Clerk of the Legislature shall deliver a certified copy thereof in French and another in English to the Queen's printer, who is bound to print the same.

The number of copies to be thus printed in each language is determined by the Lieutenant-Governor in Council.

The two Houses of the Legislature may, by joint resolution, regulate the distribution of the printed copies of the statutes to their members; and in default of such resolution, the Lieutenant-Governor in Council passes an order for that purpose.

The distribution of the copies of the statutes, to the public departments, adminstrative bodies, judges, public officers and other persons, is regulated by an order of the Lieutenant-Governor in Council.— Q. 49-50 Vict., cap. 95, ss. 44, 47, 50, 51.

Digitized by Google

✱ **5.** The persons entitled to such distribution are: the members of both houses of parliament, and the public departments, administrative bodies and public officers mentioned in the said list.—C. S. C., cap. 5 ss. 8, 9. [I. 243.]

Amendment.—The distribution of the copies of the statutes to the public departments, administrative bodies, judges, public officers and other persons, is regulated by an order of the Lieutenant-Governor in Council.

The Provincial Secretary is bound to furnish to the Queen's printer, as occasion requires, copies of all orders in council made under the provisions of this act.

The Queen's printer is bound, as soon as possible after the close of each session of the legislature, to distribute copies of the statutes in accordance with the joint resolutions and orders in council above mentioned.—Q. 49-50 Vict., cap. 95, ss. 51 to 53.

6. The laws of Lower Canada govern the immoveable property situate within its limits.—1 Fœlix, nn. 60, 61 et seq.; 1 Marcadé, n. 75; 1 Boullenois, pp. 7, 26, 27, 28 et seq.; Pothier, Intr. aux Cout., nn. 22 & 23 et seq.; 1 Toullier n. 119; C. N. 3. [I. 243.]

DECISIONS:—1. Des époux domiciliés et mariés dans le Bas-Canada, sont régis dans leurs relations comme tels par la loi du Bas-Canada, lors même qu'ils vont s'établir à l'étranger.

La vente par la femme ainsi mariée, conjointement avec son mari, mais sans mention d'autorisation de ce dernier, faite dans l'Etat de New-York, où cette mention n'est pas requise, d'immeubles situés dans le Bas-Canada, est absolument nulle, tant sous le rapport du statut personnel, qui régit la personne de la femme, que sous le rapport du statut réel, quant à l'aliénation des immeubles.

La ratification subséquente, avec l'autorisation du mari, ne peut valider une semblable vente, et n'a l'effet d'aliéner la propriété que du jour de telle ratification.—Q. B.—*Laviolette & Martin*, 11 L. C. R., p. 254.

2. Contracts disposing of real estate or immoveables are governed as to their validity by the law of the country in which the real estate is situated and by the law of the place where the contract is made.—STUART, J.—*Bélanger vs Mann*, 11 Q. L. R., p. 21.

3. The right of dower is regulated by the law of the place where the immoveable is situated and therefore accrues to the wife on an immoveable in the Province of Quebec, although the consorts may have been domiciled at the time of the marriage in England, by the law of which country dower would not accrue.—Q. B.—*Erichsen & Cuvillier*, 3 L. N., p. 282, 25 L. C. J., p. 80.

4. There is no community of property, according to the custom of Paris, between parties married in England, their then domicile, without any ante nuptial contract, who have afterwards changed their domicile, and settled and died in Lower Canada.—Q. B.—*Rogers & Rogers*, 3 L. C. J., p. 64.

5. In the absence of proof of the laws of the place where parties had their

Digitized by Google

domicile when they were married out of Lower Canada, the Court cannot take notice of or be governed by any other laws than those in force in Lower Canada in deciding upon the matrimonial rights of the parties.—C. R.—*Brodie vs Cowan*, 7 L. C. J., p. 96.

6. That a will executed in the Province of Quebec by a person domiciled therein, with reference to a portion of an estate situated in the Province, must be interpreted according to the laws of the Province and not according to English law, although the will be in the English language and be couched in English legal phraseology.—PRIVY COUNCIL.—*Mc Gibbon & Abbott*, 8 L. N., p. 267, 10 App. Cas., p. 653, R. A. C., p. 1027.

Moveable property is governed by the law of the domicile of its owner. But the law of Lower Canada is applied whenever the question involved relates to the distinction or nature of the property, to privileges and rights of lien, contestations as to possession, the jurisdiction of the courts and procedure, to the mode of execution and attachment, to public policy and the rights of the crown, and also in any other cases specially provided for by this code;—1 Fœlix, n. 61 ; 1 Boullenois, pp. 8, 338, 339 ; Pothier, Intr. aux Cout., n. 24 ; 1 Toullier, n. 117 ; 1 Marcadé, p. 56 ; 5 Pand. Franc. pp. 35-6 ; 1 Duranton, n. 99 ; 18 Merlin, p. 432 ; 1 Rogron, p. 7 ; 1 Zachariæ, p. 38 ; 1 Delsol, p. 24 ; 1 Proudhon, p. 98 ; Lahaie, p. 2 ; Rivière, p. 25 ; 1 Prevost de la Jannès, p. LXXXIII ; Demante, p. 8 ; 1 Demolombe, n. 94 ; Cubain, pp. 412-3 ; 8 Savigny, pp. 169, 173. [I. 245.]

The laws of Lower Canada relative to persons, apply to all persons being therein, even to those not domiciled there; subject, as to the latter, to the exception mentioned at the end of the present article.—Toullier, n. 113 et seq. ; 1 Zachariæ, pp. 36-37 ; 1 Fœlix, pp. 19, 62. [I. 245.]

An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons ; but these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country.—1 Toullier, nn. 114, 115 ; 1 Zachariæ, p. 37 ; 1 Fœlix, p. 58 ; 1 Boullenois, pp. 147, 152 ; 1 Maleville, p. 10. [I. 245.]

DECISIONS :—7. A receiver, appointed under the statutes of New York to an insolvent Insurance Company, (whose powers and functions are the same as those of a foreign assignee in bankruptcy), cannot intervene in a case in the Superior Court here, wherein monies belonging to the Company have been attached before judgment on the ground of insolvency and secretion of estate and claim to be paid the monies so attached (less plaintiff's costs) for distribution in New York, the legal domicile of the company.—Q. B.—*Osgood & Steel*, 16 L. C. J., p. 141.

8. C'est aujourd'hui un principe incontesté que les meubles corporels et incorporels sont régis par le statut personnel de celui à qui ils appartiennent, et

Digitized by Google

conséquemment, une police d'assurance effectée à Montréal par des personnes demeurant à Ottawa, est régie par les lois de la Province d'Ontario quant au droit de la transporter de la part de la femme, pour le bénéfice de laquelle elle était faite.—JETTÉ, J.—*Parent vs Shearer*, 23 L. C. J., p. 42.

9. Que dans une société commerciale en nom collectif formée en France, les droits respectifs des partis sont régies par le droit commercial français en force au temps de la convention.—LORANGER, J.—*Furniss vs Larocque*, M. L. R., 2 S. C., p. 405.

10. Que les formalités de justice sont réglées par la loi du pays où la demande est formée.—LORANGER, J.—*Giles vs Giroux*. 13 R. L., p. 652.

11. Que dans l'espèce, aux termes de la maxime *lex loci contractus*, l'appelant devait être débouté de sa demande, vu que le seul recours qu'il pouvait exercer était une demande pour le prix de la chose vendue.—Q. B.—*Rhode Island Locomotive Works & South Eastern Ry. Co.*, 31 L. C. J., p. 86.

12. Article 6 C. C., does not apply to prevent the exercise of the right of stoppage *in transitu* in the case of goods shipped in England, when the right accrues, under the law of that country.—ANDREWS, J.—*Rogers vs Mississipi & Dominion S. S. Co.*, 14 Q. L. R., p. 99.

7. Acts and deeds made and passed out of Lower Canada, are valid, if made according to the forms required by the law of the country where they were passed or made.—Domat, *Liv. Prél.*, tit. 1, § 2, n. 20 ; Pothier, *Introd. aux Cout.*, ch. 1, nn. 6, 7 ; Dard., p. 2 ; Lahaie, p. 2 ; C. L., 9 ; C. N., 3. [I. 245.]

8. Deeds are construed according to the laws of the country where they were passed, unless there is some law to the contrary, or the parties have agreed otherwise, or by the nature of the deed or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place ; in any of which cases, effect is given to such law, or such intention expressed or presumed.—1 Fœlix, p. 80 et seq. ; 1 Toullier. [I. 245.]

DECISIONS:—1. The law of the country in which a contract is made and its usages in trade, must govern in mercantile cases.—K. B.—*Allen vs Scaife*, 2 R. de L., p. 77.

2. The prescription of a promissory note made in a foreign country and payable there, is to be governed by the law *lex fori*, and not by the *lex loci contractus*.—BERTHELOT, J.—*Wilson vs Demers*, 10 L. C. J., p. 261.

3. A bill of lading made in England by the master of an English ship, is a contract to be governed and determined by English law.—PRIVY COUNCIL.—*Moore & Harris*, 2 Q. L. R., p. 147, 1 App. Cas., p. 318.

4. That a bond in favor of a foreign insurance company, which is signed in this Province, is to be interpreted according to our law. That, by our law, where power is given to cancel a policy of insurance on account of non-payment of premium, that power must be exercised before tender is made of the amount due. That the surrender value of a policy of insurance is everywhere the same,

Digitized by Google

and is not subject to an arbitrary decision of the company, fixing it at a less sum in a foreign country than that provided by the conditions of the policy.—Q. B.—*Vennor & Life Assurance Company of Scotland*, 30 L. C. J., p. 303.

9. No act of the legislature affects the rights or prerogatives of the crown, unless they are included therein by special enactment.

The rights of third parties, who are not specially mentioned in any such act, are likewise exempt from the effect thereof, unless the act is public and general.—C. S. C., cap. 5, s. 6, § 25. [I. 245.]

DECISION :—Article 9 of the Civil Code refers only to such rights and prerogatives of the Crown as are attributions of the sovereignty and not to such rights as may be possessed equally by subjects.—MATHIEU, J.—*Hon. Sir A. Campbell vs Judah*, 7 L. N., p. 147.

10. An act is public, either by its nature or by its being so declared. All other acts are private.

All persons are bound to take cognizance of public acts ; but private acts must be pleaded.—C. S. C., cap. 5, s. 6, § 27.

Amendments :—Every act shall, unless by express provision it is declared to be a private act, be deemed to be a public act, and shall be judicially noticed by all judges, justices of the peace and others, without being specially pleaded ; and all copies of acts, public or private, printed by the Queen's printer, shall be evidence of such acts and of their contents and every copy purporting to be printed by the Queen's printer shall be deemed to be so printed, unless the contrary be shown.—D. 31 Vict., cap. 1, s. 7, § 38.

Notwithstanding article 10 of the civil code, all acts of this province are public unless they are declared to be private. All persons are bound to take cognizance of public acts ; but private acts must be pleaded.—Q. 31 Vict., cap. 7, s. 6.

11. A judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law.—*ff* L. 12, *De legibus ;* Domat, *Liv. Prél.*, tit. 1, s. 2, n. 9 to 24 ; C. S. L. C., c. 82, s. 1 : 1 Pand. Franç., pp. 424 et seq. ; 1 Locré, *Esprit du Code*, 213, 214 ; 1 Duranton, nn. 95, 100 ; Dard., p. 2, art. 4 ; C. N., 4 ; C. L., 21. [I. 245.]

12. When a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the legislature, and to attain the object for which it was passed.

The preamble, which forms part of the act, assists in explaining it. —C. S. C., c. 5, s. 6, § 28 ; C. S. L. C., c. 82, s. 1.

Digitized by Google

Amendments:—The preamble of every statute forms part thereof and assists in explaining its purport and object. The purport and object of every provision of any statute are deemed to be to remedy some evil or promote some good, whether the law commands or prohibits the doing of an act which it considers to be advantageous or hurtful to the public good, or inflicts punishment upon offenders. Such statute receives such fair, large and liberal construction as will ensure the attainment of its objects and the carrying out of its provisions according to their true intent, meaning and spirit.—Q. 49-50 Vict., cap. 95, ss. 12, 13.

13. No one can by private agreement, validly contravene the laws of public order and good morals.—Pothier, *Obl.*, n. 15; Merlin, Rep. vo. *Loi*, n. 43, § 8; Lahaie, p. 4; C. N. 6; C. L. 11. [I. 247.]

14. Prohibitive laws import nullity, although such nullity be not therein expressed.—Cod. L. 5, *De legibus*, liv. 1, tit. 14; 1 Toullier, n. 90; 1 Bouhier, p. 390; C. L. 12. [I. 247.]

DECISION:—Qu'un donateur ne peut, par une clause d'insaisissabilité, soustraire les biens donnés aux charges et contributions imposées dans l'intérêt public; et que malgré cette clause d'insaisissabilité les biens qui y sont sujets peuvent être vendus pour taxes municipales.—JETTÉ, J.—*Cité de Montréal vs Bronnsdon*, M. L. R., 3 S. C., p. 146.

15. The word "shall" is to be construed as imperative, and the word "may" as permissive.—C. S. L. C., c. 1, s. 13, § 3.

Amendment:—Whenever it is provided that a thing "shall" be done or "must" be done, the obligation is imperative; but if it is provided that a thing "may" be done, its accomplishment is permissive.—Q. 49-50 Vict., cap. 95, s. 19.

16. Penalties, confiscations and fines incurred for contraventions of the laws, are recoverable, unless it is otherwise specially provided, by ordinary process of law, in the name of Her Majesty, alone, or jointly with another prosecutor, before any court having civil jurisdiction to the amount sought to be recovered, except only the Commissioners' Courts for the summary trial of small causes, which are prohibited from taking cognizance of these cases.—C. S. C., c. 5, s. 6, § 17; C. S. L. C., c. 94, s. 8.

17. The words, terms, expressions and enactments enumerated in the following schedule wherever used in this code or in any act of the provincial legislature, have the meaning and application respect-

Digitized by Google

ively assigned to them in such schedule, and are interpreted in the manner therein specified, unless there is some special enactment to the contrary.

SCHEDULE

1. Each of the expressions "Her Majesty," "the King," "the Sovereign," "the Queen," "the Crown," means the king or the queen, his or her heirs and successors, sovereigns of the United Kingdom of Great Britain and Ireland. C. S. C., c. 5, s. 6, § 1.

2. The words "imperial parliament" mean the parliament of the United Kingdom of Great Britain and Ireland; the words "imperial acts or statutes" mean the laws passed by that parliament, and the words "act" and "statute" whenever they are made use of in this code, without qualification, mean the acts and statutes of the parliament of Canada.

By the words "provincial parliament" is understood the parliament of Canada, and the words "provincial acts or statutes" mean the laws passed by that parliament.

3. The words "governor," "governor of this province," "Governor General," or "Governor in Chief," mean the governor, lieutenant-governor or the person administering the government of this province. C. S. C., c. 5, s. 6, § 2.

4. "Governor in Council" means the governor, lieutenant-governor or the person administering the government, acting with the advice of the executive council of this province. *Ibid*, § 3.

5. The word "proclamation" means proclamation under the great seal; and by "great seal" the great seal of the province of Canada is understood. C. S. L. C., c. 1, s. 13, § 6.

6. "Lower Canada" means all that part of the province of Canada which, previously to the union, constituted the province of Lower Canada; and "Upper Canada" that part which, at the same time, constituted the province of Upper Canada. C. S. C., c. 5, s. 6, §§ 4, 5.

7. The words "The United Kingdom" mean the United Kingdom of Great Britain and Ireland; and "the United States," the United States of America. *Ibid*, § 6.

8. The name commonly given to a country, place, body, corporation, society, officer, functionary, person, party or thing, designates and means the country, place, body, corporation, society, officer, functionary, person, party or thing thus named without the necessity of more ample description. *Ibid*, § 6.

9. The masculine gender includes both sexes, unless it appears by the context that it is only applicable to one of them. *Ibid*, § 7.

10. The singular number extends to more than one person, or more than one thing of the same sort, whenever the context admits of such extension. *Ibid*, § 7.

11. The word "person" includes bodies politic and corporate, and extends to heirs and legal representatives, unless such meaning is contrary to law or inconsistent with the particular circumstances of the case. *Ibid*, § 8.

12. The word "writing," "written," or terms of like import, include words printed or otherwise traced or copied. *Ibid*, § 9.

Digitized by Google

13. The word "month" means a calendar month.—*Ibid*, § 11, Story on Bills, 379; Wharton's L. L., p. 656.

14. By "holidays" are understood the following days: Sundays, New Year's Day, the Epiphany, the Annunciation, Good Friday, the Ascension, *Corpus Christi*, the festival of St. Peter and St Paul, All Saints' Day, Christmas Day and any other day fixed by proclamation as a day of general fast or thanksgiving; saving the special provisions established by the statutes concerning the collection of the revenue and the payment of bills of exchange and promissory notes.—C. S. C., c. 5, s 6, § 12, c. 16, s. 16, c. 57, s 5; C. S. L. C., c. 64, s. 32.

15. The word "oath" includes the solemn affirmation which certain persons are permitted to make instead of an oath.—C. S. C., c. 5, s. 6, § 13; C. S. L. C., c. 34, s. 8; c. 82, s. 13.

16. The word "magistrate" means a justice of the peace. "Two justices of the peace" means two or more justices sitting or acting together. When anything is ordered to be done by or before a justice of the peace, magistrate, functionary or public officer, one is understood whose powers or jurisdiction extend to the place where such thing ought to be done.

The authority given to do a thing carries with it all the powers necessary for that purpose.—C. S. C., c. 5, s. 6, § 20.

17. The right of nominating to an office or employment carries with it that of removal.—*Ibid.* 22.

18. The duties imposed and the powers conferred upon an officer or public functionary, in his official capacity, pass to his successor, and pertain to his deputy in so far as they are compatible with the charge of the latter.—*Ibid*, § 23; C. S. L. C., c. 77, s. 16.

19. When an act is to be performed by more than two persons, it may be validly done by the majority of them, except in the cases otherwise specially provided.—C. S. C., c. 5, s. 6, § 24; C. S. L. C., c. 1, s. 13, § 5.

20. The pound sterling is equivalent to the sum of four dollars, eighty six cents and two thirds, or one pound, four shillings and four pence, currency. The "sovereign" is of like value.—C. S. C., c. 15, s. 4; C. S. L. C., c. 82, s. 3.

21. By the terms "inhabitant of Lower Canada" is meant a person having his domicile in that part of the province.

22. The terms "acts of civil status" mean the entries made in the registers kept according to law, to establish births, marriages and burials.

"Registers of civil status" are the books so kept and in which such acts are entered.

"Officers of civil status" are those intrusted with the keeping of such registers.

23. By "bankruptcy" is meant the condition of a trader who has discontinued his payments.—2 Bornier sur Ord. 1673, 666; Guyot, Répert., vo. Faillite, 273; Bonin, n. 723, p. 312; Pardessus, n. 1091; 1 Delvincourt, Dr. Com., 242.

24. A fortuitous event is one which is unforeseen, and caused by superior force which it was impossible to resist.—*ff* Lib. 50, tit. 8, L. 2, § 7, *de adm. rer.*; Merlin, Rép., vo. Cas. § 7, p. 368; Ancien Denisart, vo. Cas. [I. 247 to 251.]

Amendments:—See "An Act respecting the interpretation of the "Statutes of this Province."—Q. 31 Vict. cap. 7.

See also "An act respecting the Statutes of Canada," D. 31 Vict. cap. 1.

Digitized by Google

The masculine gender includes both sexes, unless it appears by the context that it is only applicable to one of them.

The singular number extends to more than one person or more than one thing of the same sort, whenever the context admits of such extension.

The right of nominating to an employment or office carries with it that of removal.

When anything is ordered to be done by or before a judge magistrate, functionary or public officer, one is understood whose powers or jusidiction extend to the place where such thing is to be done.

The authority given to do a thing carries with it all the powers necessary for that purpose.

Unless otherwise specially provided, whenever an oath is ordered to be taken or received, such oath is received, and the certificate of its having been taken is given, by any judge, magistrate or commissioner authorized to that effect, having jurisdiction in the place where the oath is taken.

The duties imposed, and the powers conferred, upon an officer or public functionary in his official capacity, pass to his successor and pertain to his deputy, in so far as they are compatible with the office of the latter.

When an act is to be performed by more than two persons, it may be validly done by the majority of them, except in other cases specially provided.—Q. 49-50 Vict., cap. 95, ss. 21 to 27.

The following words, terms and expressions whenever used in any statute, have the sense, meaning and application, respectively assigned to them in this article and are interpreted in the manner therein specified, unless there are some special enactments to the contrary:

1. The words " Her Majesty, " " the King, " " the Sovereign, " " the Queen, " " the Crown, " mean the King or the Queen, his or her heirs and successors, sovereigns of the United Kingdom of Great-Britain and Ireland.—C. C., art. 17, § 1; 31 V., c. 7, s. 2, § 1.

2. The words " Governor-General " mean the Governor-General of Canada, or the person administering the Government of Canada; and the words " Lieutenant-Governor " the Lieutenant-Governor of the Province of Quebec, or the person administering the Government of this province.—31 V., c. 7, s. 2, §§ 4, 5.

3. The words " Governor-General in Council " mean the Governor-General or person administering the Government, acting with the

Digitized by Google

advice of the Queen's Privy Council for Canada; and the words "Lieutenant-Governor in Council," the Lieutenant-Governor or person administering the Government, acting under the advice of the executive council of the province of Quebec.—B. N. A. Act, 1867, ss. 11, 12, 13, 14, 66, 67; 31 V., c. 7, s. 2, § 6.

4. The words "United Kingdom" mean the United Kingdom of Great Britain and Ireland; the words "United States," the United States of America; the words "Dominion," "Canada" mean the Dominion of Canada.—C. C. art. 17, § 7; 31 V., c. 7, s. 2, §§ 1, 7, 8.

5. The words "the Union" mean the union of the Provinces effected under the British North America Act, 1867.—31 V., c. 7, s. 2, § 19.

6. The words "Lower Canada" mean that part of Canada which heretofore constituted the Province of Lower Canada, and mean now the Province of Quebec.—B. N. A. Act, 1867, s. 6; C. C. art. 17, § 6.

7. The word "Province" when used alone, means the Province of Quebec; and the qualification "provincial," added to the words "act," "statute" or "law," means an act, statute or law of this Province.—31 V., c. 7, s. 2, §§ 3, 10.

8. The words "Imperial Parliament" mean the parliament of the United Kingdom of Great Britain and Ireland.

The words "Federal Parliament" mean the parliament of Canada; the word "Legislature" means the Legislature of Quebec.—31 V., c. 7, s. 2, §§ 2, 9.

9. The word "session" means the session of the Legislature of Quebec; the words "session of the Legislature," mean the whole period during which a session of the Legislature is held, including both the day of its opening and the day of its prorogation.—31 V., c. 7, s. 2, §§ 14, 29.

10. The words "Imperial acts" or "Imperial statutes" mean the laws passed by the Imperial Parliament; the words "Federal acts" or "Federal statutes" mean the laws passed by the Parliament of Canada; the words "act," "statute" or "law," whenever used without qualification, mean the acts, statutes and laws of the Legislature of Quebec.—31 V., c. 7, s. 2, §§ 2, 10.

11. The words "Civil Code" and "Code of Civil Procedure" mean the Civil Code and Code of Civil Procedure of Lower Canada; the words "Municipal Code" mean the Municipal Code of the Province of Quebec.—31 V., c. 7, s. 2, § 12; 34 V., c. 68, s. 1087.

12. The words the "Government" or the "Executive Govern-

Digitized by Google

ment" mean the Lieutenant-Governor and the executive council of this Province.—31 V., c. 7, s. 2, § 15.

13. The words "the law officers" or "the law officers of the Crown" mean the attorney general and the solicitor general of this Province.—31 V., c. 7, s. 2, § 20.

14. Words designating a department or public officer refer to the department or officer of like name for this Province.—31 V., c. 7, s. 2, § 23.

15. The word "magistrate" means a justice of the peace; "Two justices of the peace" mean two or more justices acting together.—C. C., art. 17, § 16; 31 V., c. 7, s. 2, § 1.

16. The word "person" includes bodies politic and corporate, and extends to heirs and legal representatives, unless the statute or the particular circumstances of the case are opposed thereto.—C. C., art. 17, § 11; 31 V., c. 7, s. 2, § 1.

17. The name commonly given to a country, place, body, corporation, society, officer, functionary, person, party or thing, designates and means the country, place, body, corporation, society, officer, functionary, person, party or thing thus named, without the necessity of more ample description.—C. C., art. 17, § 8; 31 V., c. 7, s. 2, § 1.

18. The word "commission," whenever it refers to a commission issued by the Lieutenant-Governor under any statute or order in council, means a commission under the Great Seal, running in the Queen's name.—31 V., c. 7, s. 2, § 30.

19. The word "proclamation" means a proclamation under the Great Seal.—31 V., c. 7, s. 2, § 11.

20. The words "Great Seal" mean the Great Seal of the Province of Quebec.—31 V., c. 7 s. 2, § 11.

21. The words "writing," "manuscript," and terms of like import, include that which is printed, painted, engraved, lithographed or otherwise traced or copied.—C. C., art. 17, § 12; 31 V., c. 7, s. 2, § 1.

22. The terms "acts of civil status" mean the entries made in the registers, kept according to law to establish births, marriages and burials.

"Registers of civil status" are the books so kept, and in which such acts are entered.

"Officers of civil status" are those intrusted with the keeping of such registers.—C. C. 17, § 22; 31 V., c. 7, s. 2, § 1.

23. By holidays are understood the followings days:

a. Sundays;

b. New Year's Day;

Digitized by Google

c. The Epiphany, the Annunciation, Ash Wednesday, Good Friday, Easter Monday, the Ascension, *Corpus Christi*, the festival of St. Peter and St. Paul, All Saints'Day, the Conception and Christmas Day;

d. The anniversary of the birthday of the Sovereign, or the day fixed by proclamation for its celebration;

e. The first day of July, (the anniversary of the day on which the Union Act came into force,) or the second day of July, if the first is a Sunday;

f. Any other day fixed by Royal proclamation or by proclamation of the Governor-General or of the Lieutenant-Governor, as a day of general fast or thanksgiving.—C. C., art. 17, § 14; 31 V., c; 7, s. 2, §§ 1, 25; 42-43 V., c. 19, s. 2.

24. The word " month " means a calendar month.—C. C., art. 17, § 13; 31 V., c. 7, s. 2, § 1.

25. The words " now " and " next " apply to the time at which the act becomes executory, 31 V., c. 7, s. 2, § 28.

26. The word " oath " includes the solemn affirmation which certain persons are permitted to make instead of an oath.—C. C., art. 17, § 15; 31 V., c. 7, s. 2, § 1.

27. By " bankruptcy " is meant the condition of a trader who has discontinued his payments.—C. C., art. 17, § 23; 31 V., c. 7, s. 2. § 1.—Q. 49-50 Vict., cap. 95, s. 36.

DECISIONS:—1. That a Company ceasing to meet its ordinary payments as they become due, though its nominal assets may be equal to its liabilities, will be deemed insolvent, and cannot claim the benefit of the term upon a promissory note not yet due.—Taschereau, J.—*Corcoran vs Montreal Abattoir Co.*, 6 L. N., p. 135.

2. In order to prove insolvency or *déconfiture* it mu-t be shewn that the assets of the debtor are less than his liabilities.—Torrance, J.—*Mantha vs Simard*, 6 L. N., p. 195.

3. A firm which has ceased to meet its ordinary payments as they become due, will be deemed insolvent under 1092 C. C. and the insolvency of the firm entails that of the partners individually.—Johnson, J.—*Ontario Bank vs Foster*, 6 L. N., p. 398.

4. Que l'inhabilité à payer une dette particulière n'est pas pour un commerçant l'état de faillite, qui n'existe que lorsqu'il a cessé ses paiements en général.—C. R.—*Sirois vs Beaulieu*, 13 Q. L. R., p. 293.

5. Que celui qui plaide la force majeure ne peut être exempt de toute responsabilité qu'en autant que l'accident n'a pas été précédé ni accompagné ni suivi d'une faute qui lui soit imputable.—Loranger, J.—*Alexander vs Hutchinson*, M. L. R., 3 S. C., p. 283.

Digitized by Google

BOOK FIRST.

OF PERSONS.

TITLE FIRST.

OF THE ENJOYMENT AND LOSS OF CIVIL RIGHTS.

CHAPTER FIRST.

OF THE ENJOYMENT OF CIVIL RIGHTS.

18. Every British subject is, as regards the enjoyment of civil rights in Lower Canada, on the same footing as those born therein, saving the special rules relating to domicile.—Capit. of Quebec, 1759; Treaty of St. Germain, 1763; C. N. 8. [I. 251.]

19. The quality of British subject is acquired either by right of birth, or by operation of law.—C. S. C., c. 6, s. 4; 1 Duranton, p. 120; C. N., 7. [I. 253.]

20. A person born in any part of the British empire, even of an alien, is a British subject by right of birth, as also is he whose father or grandfather by the father's side is a British subject, although he be himself born in a foreign country; saving the exceptions resulting from special laws of the empire.—C. S. C., c. 8, ss. 1 et seq.; Pothier, *Des personnes*, p. 573; 1 Duranton, n. 120; Lahaie, sur art. 5; 1 Blackstone, p. 374, notes 16, 17, 18, 366, note 1; 2 Kent, 38; 2 Stephens, 429, 515; Chalmer's Op., 332; 1 Hale, *Pleas of the Crown*,

Digitized by Google

p. 68; 1 Commyns, 541; Chitty, on Prerogatives, 13; Paillet, Manuel, p. 23; C. N., 10. [I. 253.]

21. An alien becomes a British subject by operation of law, by conforming to the conditions the law prescribes.—1 Blackstone, 374, notes 16, 17, 18; 2 Stephens, 427 to 433; Hale, *loc. cit.*; Foster, 184; C. N., 9. [I. 253.]

DECISION:—Who is an alien, is a question to be decided by the law of England; but when alienage is established the consequences which result from it are to be determined by the law of Canada.

If an alien dies, without issue, his lands belong to the Crown, but if he leaves children, some born in Canada, and others not, the former exclude the Crown, and then all the children inherit as if they were natural born subjects.

Where an alien has a son who is also an alien, the children of the latter inherit from the grand-father to the exclusion of their father.

Although an act of the legislature, passed after judgment rendered in a court of original jurisdiction, may effect the rights of a party as they existed at the institution of a suit, this circumstance cannot be taken advantage of in an appeal from the judgment.—PRIVY COUNCIL.—*Donegani & Donegani*, Stuart's Reports, p. 605, 3 Knapp's P. C. Rep., p. 63.

22. These conditions, as prescribed by the laws of this province, are:

1. Residence during three years at least in some part of the province of Canada, with the intention of settling therein;

2. Taking the oaths of residence and allegiance required by law; or in the case of a woman the oath of residence alone;

3. Procuring from the proper court, with the necessary formalities, the certificate of naturalization required by law.—C. S. C., c. 8, ss. 1, 2, 3, 4; C. N., 9. [I. 253.]

Amendments:—See the "Naturalization Act," which is too lengthy to quote here.—R. S. C., cap. 113.

23. An alien woman is naturalized by the mere fact of the marriage she contracts with a British subject.—C. S. C., c. 8, s. 7; C. N., 12, 19. [I. 253.]

24. Naturalization confers in Lower Canada, on him by whom it is obtained, all the rights and privileges he would have if born a British subject.—*Ibid.*, s. 1; C. N. 13. [I. 253.]

25. Aliens have a right to acquire and transmit by gratuitous or onerous title, as well as by succession or by will, all moveable and

Digitized by Google

immoveable property in Lower Canada, in the same manner as British-born or naturalized subjects.—*Ibid.* s. 9 ; Pothier, *Des personnes*, p. 578 ; C. N. 11. [I. 253.]

DECISION :—That under the Act 12 Vict. cap. 197, which enacts that every alien shall have the same capacity to take, receive, and transmit "real estate" in all parts of this province, as natural born or naturalized subjects, the alien is placed in the same position, as the natural born subject and can claim conjointly with a naturalized heir both real and personal property. That although moveable property be not mentioned in the 12th section of the act, it must be taken to be included in the larger term "real estate."—C. R.—*Corse vs Corse*, 4 L. C. R. p. 310.

26. Aliens may also serve as jurors, in all cases where, according to law, a jury must be composed of one half of foreigners.—C. S. C. c. 8, s. 23 ; C. S. L. C., c. 84, s. 41, § 3, s. 4. [I. 253.]

Amendments :—No alien shall be entitled to be tried by a jury *de medietate linguæ*, but shall be tried as if he was a natural born subject.—R. S. C., cap. 174, s. 161.

The following persons are disqualified from serving as grand or petit jurors respectively :.... Aliens.—Q. 46 Vict., cap. 16, s. 3.

27. Aliens, although not resident in Lower Canada, may be sued in its courts for the fulfilment of obligations contracted by them even in foreign countries.—12 Vict., c. 38, s. s. 14, 49, 94 ; C. S. L. C., c. 83, s. 61 ; 2 Pand. Franç., 140 ; 1 Pigeau, 85 ; Raveau, 6 ; Ord. 1667, tit. 2, art. 7 ; C. N., 14. [I. 253.]

28. Any inhabitant of Lower Canada may be sued in its courts for the fulfilment of obligations contracted by him in foreign countries, even in favor of a foreigner.—C. N., 15. [I. 255].

29. Every person, not resident in Lower Canada who brings or institutes any action, suit or proceeding in its courts, is bound to give to the opposite party, whether a subject of Her Majesty or not, security for the costs which may be incurred in consequence of such proceeding —C. S. L. C., c. 83, s. 68 ; 2 Pand. Franc., 143 ; Pothier, *Des personnes*, 577 ; C. N. 16. [I. 255.]

DECISIONS :—1. The security *judicatum solvi* cannot be exacted from any person *residing* in Lower Canada, even supposing that he is not a householder therein, and that he has another domicile out of Lower Canada.—BERTHELOT, J.—*Ryland vs Ogilvie*, 10 L. C. J., p. 200.

2. The temporary absence of the plaintiff from the Province, when his family continues to reside therein, does not render him liable to give security for costs. —DOHERTY, J.—*Mountain vs Walker*, 5 R. L., p. 747.

3. That a Plaintiff temporarily non-resident, will not be held to give security

Digitized by Google

for costs under C. C. 29, and the Court, before requiring such security, must be satisfied that the non-residence is more than temporary.—TORRANCE, J.—*Prentice vs. Graphic Company*, 22 L. C. J., p. 268.

3. That the temporary absence of the Plaintiff from the Province while working on a timber limit in Ontario, but while his family continues to dwell in his house in this Province, does not render him liable for security for costs.—WURTELE, J.—*Tremblay vs. Bastien*, 11 L. N., p. 5.

4. A seaman not resident in the province must give security for costs.—K. B.—*Hearsdman vs. Harrowsmith*, 3 R. de L., p. 347.

5. Le maître d'un vaisseau étranger qui a son domicile hors de la province, mais qui est temporairement dans ses limites, lors de l'institution de l'action doit fournir caution lorsqu'il est demandeur.—MEREDITH, C. J.—*Grace vs. Crawford*, 3 R. L., p. 447.

6. An officer stationed with his regiment in the province cannot be compelled to give security for costs.—K. B.—*Sutherland vs. Heathcote*, 3 R. de L., p. 347.

7. Que lorsqu'un demandeur, pendant l'instance, laisse la Province de Québec, le demandeur peut demander le cautionnement *judicatum solvi*, et que la motion pour l'obtenir peut être faite en tout temps, même après l'expiration des quatre jours qui suivent la connaissance qu'aurait eu le défendeur du départ du demandeur.

Que le délai de quatre jours pour demander le dit cautionnement ne s'applique que lorsque la demande est faite par exception dilatoire et non par motion. (C. C. 120). MATHIEU, J.—*Cyr vs. Bryson*, M. L. R., 1 S. C., p. 495, 13 R. L., p. 681,

8. Que lorsque, durant l'instance, le demandeur laisse la Province de Québec, pour aller résider ailleurs, le défendeur a droit au cautionnement *judicatum solvi*, non seulement pour les frais à encourir, mais également pour tous les frais encourus.—MATHIEU, J.—*Gauthier vs. Dupras*, M. L. R., 1 S. C., p. 510.

9. An incidental plaintiff must give security for costs, if he be resident without the province.—K. B.—*McCallum vs. Delano*, 3 R. de L., p. 199.

10. An incidental plaintiff, residing beyond the limits of the province of Quebec, will be held to give security for costs upon his incidental demand.—TORRANCE, J.—*Davidson vs. Cameron*, 15 L. C. J., p. 217.

11. An opposant *afin de conserver* residing out of the province who contests the collocation by privilege of another opposant *afin de conserver*, is bound to give security for costs.—MONDELET, C. J.—*Benning vs. Montreal Rubber Company*, 2 L. C. J., p. 287.

12. On ne peut demander des cautions pour frais à un opposant résidant hors de la province, qui fait une opposition afin de conserver.—LORANGER, J.—*Dupré vs. Cantara*, 1 R. L., p. 39.

13. Que l'opposant résidant hors de la Province qui demande la distraction de la chose saisie, doit le cautionnement *judicatum solvi*.—C. R.—*Miller vs. Déchène*, 8 Q. L. R., p. 18.

14. That under C. C. 39, the opposant in all oppositions, even in the case of an opposition *afin d'annuler*, residing without Lower Canada is bound to give sufficient security for costs.—Q. B.—*Beckett & Banque National*, 31 L. C. J., p. 249, M. L. R., 3 Q. B., p. 274.

Digitized by Google

15. Plaintiffs leaving the Province after judgment rendered must give security for costs to an opposant on contestation of his opposition.—BADGLEY, J.—*Mahoney vs. Tomkins*, 9 L. C. R,, p. 72.

16. When the Plaintiff who resides without the Province contests an opposition, the opposant is not entitled, under 41 Geo. III, c. 7, s. 2, to security for costs, the plaintiff in such case not being the party prosecuting but, on the contrary, occupying the position of a defendant.—STUART, J.—*Brigham vs. McDonnell*, 10 L. C. R., p. 452.

17. Un opposant dont l'opposition *afin de distraire* est contestée par le demandeur (étranger) peut lui demander, 1° caution pour les frais, 2° la production d'une procuration au procureur *ad litem*.—TORRANCE, J.—*Baltzar vs. Grewing*, 1 R. L., p. 437.

18. A plaintiff residing out of the province, cannot be compelled to give security for costs, nor can his attorney *ad litem* be compelled to produce his power of attorney, on an issue raised by the plaintiff contesting the opposant's opposition.—RAMSAY, J.— *Webster vs. Philbrick*, 15 L. C. J., p. 242.

19. A non-resident plaintiff, contesting an opposition, cannot be compelled to give security for costs.—WURTELE, J.—*Waugh vs. Porteous*, 10 L. N., p. 138.

20. L'instance est la série des actes d'une procédure judiciaire ayant pour objet de saisir le tribunal d'une contestation, d'instruire la cause et d'obtenir finalement le jugement qui doit vider le débat.

Que l'opposant sur opposition afin de distraire n'a pas droit au cautionnement *judicatum solvi* et ne peut exiger tel cautionnement du demandeur aubain.—C. R.—*Park vs. Rivard*, M. L. R., 1 S. C., p. 291, 29 L. C. J., p. 236, 13 R. L., p. 479.

21. A non-resident plaintiff contesting the collocation of an opposant is bound to give security for costs.—TORRANCE, J.—*Société Anonyme des Glaces et Produits Chimiques de St. Gobain et Cie. vs. Giberton*, 5 L. N., p. 94.

22. Que le demandeur non-résident qui conteste une collocation portée dans un jugement de distribution est tenu de fournir caution pour les frais.—TASCHEREAU, J.—*Bornais vs. Arpin*, 15 R. L., p. 287, M. L. R., 3 S. C., p. 84.

23. A foreign Insurance Company which has a place of business in the province of Quebec, is not bound to give security for costs.—DORION, J.—*Globe Mutual Ins. Co. of N. Y. vs. Sun Mutual Ins. Co.*, 1 L. N., p. 53.

24. An Ontario Insurance Company, though doing business in Montreal, is bound to give security for costs.—TORRANCE, J.—*Niagara District Mutual Sun Ins. Co. vs. Macfarlane*, 21 L. C. J., p. 224.

25. An assignee or receiver of an insolvent insurance company, incorporated and doing business prior to its insolvency in Ontario, is bound to give security for costs, in a suit brought by him here, notwithstanding that he resides here, and has in his possession here all the books and titles to claims of the said Company,—PAPINEAU, J.—*Giles vs. Jacques*, 27 L. C. J., p. 182.

26. Que le fait qu'une personne qui réside dans la province de Québec, et y intente une action, n'est que le prête-nom d'une autre personne résidant en dehors de la dite province, n'est pas suffisant pour obliger le demandeur à fournir le cautionnement *judicatum solvi*.—MATHIEU, J.—*Reed vs. Rascony*, M. L. R., 1 S. C., p. 431.

27. For the purposes of ordinary security for costs it is not necessary that

Digitized by Google

the security be the proprietor of immoveable property.—TASCHEREAU, J.—*Utley vs. McLaren*, 17 L. C. R., p. 267.

28. An application to give security for costs by the granting of a judicial bond by the Plaintiff carrying hypothec on the Plaintiff's real estate in this province or to deposit money in the court, without specifying how much, cannot be allowed.—BERTHELOT, J.—*Canadian Copper Pyrites Co. vs. Shaw*, 19 L. C. J., p. 99.

29. Qu'une femme majeure et non sous puissance de mari peut légalement être offerte comme caution judiciaire, parce que la femme est contraignable par corps. (C. C. 2272 et 2276.)—RAINVILLE, J.—*Slessor vs. Désilets*, M. L. R., 1 S. C., p. 306.

30. Qu'un cautionnement judiciaire, où la caution s'oblige généralement à payer tous les frais et dommages qui seront adjugés sans déterminer un montant quelconque qu'elle aura à payer, ne crée pas d'hypothèque judiciaire, et la caution, peut par une action, faire radier l'enregistrement fait de ce cautionnement sur ces immeubles.

Que la justification sous serment que fait une caution de sa solvabilité jusqu'à concurrence d'une somme fixe, ne fait pas partie du cautionnement et n'en détermine nullement le montant.—C. R.—*Lavallée vs. Paul*, M. L. R., 2 S. C. p. 72.

31. That an appellant will not be ordered to give new security because one of his sureties admits and declares that he was really insolvent at the time he signed the bond, although he then declared he was solvent.—Q. B.—*Riddell & McArthur*, 22 L. C. J., p. 78.

32. The Court of Queen's Bench cannot entertain a petition to have the security declared insufficient, on the ground that the respondent has discovered, since the completion of the bond, that the securities were really insufficient at the time the bond was signed.—Q. B.—*Lapointe & Faulkner*, 22 L. C. J., p. 53.

33. Whereof two co-plaintiffs, not co-partners, and between whom no *solidarité* exists, one leaves the country after suit brought, security for costs can be demanded only from the absent plaintiff.—Q. B.— *Humbert & Mignot*, 18 L. C. J., p. 217.

34. Where one of two plaintiffs is resident abroad, and the other in this province, the court will not compel the absent plaintiff to give security for costs. TORRANCE, J.—*Beaudry vs. Fleck*, 20 L. C. J., p. 304.

35. That in an action by two co-heirs, one of whom is a resident and another a non-resident, the latter will be held to give security for costs.—TORRANCE, J.—*Henderson vs. Henderson*, 23 L. C. J., p. 208.

36. After the allowance of an appeal to Her Majesty in Her Privy Council, an order to put in new security, (one of them being insolvent and the other having left the province) will be granted by this court, but this court cannot dismiss the appeal, in case such new security be not duly put in. Q. B.—*Johnson & Connolly*, 16 L. C. J., p. 100.

37. Lorsqu'une partie a droit de demander caution pour les frais, elle peut, soit présenter sa requête en vacance dans les quatre jours, ou en donner avis dans ce délai, et ensuite le demander par motion au terme suivant.—STUART, J.—*Mantha vs. Coghlan*, 3 R. L., p. 447.

38. When a non-resident Plaintiff has described himself as domiciled in this Province, and an application for security for costs has not been made within the four days from the return of the action, security will not afterwards be

Digitized by Google

ordered, unless it appear that the application is made within four days of the knowledge acquired by the Defendant of the Plaintiff's absence, or with due diligence.—WURTELE, J.—*Scharf vs. Scharf*, 10 L. N., p. 137.

39. That although the Plaintiff residing out of the Province sue *in forma pauperis*, the Defendant is nevertheless entitled to security for costs under 41 Geo. III, c. 7, s. 2.—STUART, J.—*Gagnon vs. Woolley*, 10 L. C. R., p. 234.

40. Lorsqu'un défendeur, après jugement par défaut enrégistré contre lui, a eu la permission de comparaître par une opposition et de plaider à l'action (484 et 485, C. P. C.), il ne peut ensuite faire une motion pour cautionnement *judicatum solvi*, sur le principe que le demandeur est absent, à moins que, dans son opposition, il ne se soit réservé le droit de faire telle motion.—TORRANCE, J.—*Booth vs. Lawton*, I R. L., p. 88.

41. A guardian against whom a rule for *contrainte par corps* has issued, at the instance of a party absent from Lower Canada, is entitled to security for costs, under article 29 of the Civil Code.—BERTHELOT, J.—*Miller vs. Bourgeois*, 16 L. C. J., 196.

42. Under the Insolvent Act 1875, a creditor who has no domicile in the province of Quebec, is not bound to give security for costs, though he has sued out a writ of attachment.—STUART, J.—*Reed vs. Larochelle*, 13 Q. L. R., p. 93.

43. Qu'une action contre un défendeur résidant aux Etats-Unis, qui n'a pas été assigné personnellement, sera renvoyée sur exception déclinatoire, si le demandeur ne prouve pas que le défendeur a des biens dans la juridiction de la Cour.—MATHIEU, J.—*Redfield vs. Hardie*, 13 R. L., p. 42.

44. (Similar decision).—BOURGEOIS, J.—*Cuddy vs. Cassidy*, 2 L. N., p. 346.—See also decisions noted at article 128 of Foran's C. C. P.

CHAPTER SECOND.

OF THE LOSS OF CIVIL RIGHTS.

30. Civil rights are lost:

1. In the cases which are provided for by the laws of the British Empire.

2. By civil death.—Richer, *Mort civile*, pp. 52 et seq.; Pothier, *Successions*, vol. 6, pp. 10, 11; 1 Favard, Conf., p. 61; 1 Toullier, n. 180, 266 et seq.; St. Imp. 14, 15 Hen. VIII, c. 4; 1 Petersdorf, 463 or 321; 2 Tomlins vo. *Treason*, par. 2; 1 Blk.. p. 370, note 3 & p. 374, note 21; Foster, p. 84; 1 Burge, pp. 707-8; and authorities under the following article. [I. 255.]

Digitized by Google

SECTION I.—OF CIVIL DEATH.

31. Civil death results from condemnation to certain corporal punishments.—Richer, *Mort civile*, 15, 16 ; Pothier, *Mariage*, 264 ; *Id., Des personnes*, 585 ; *Id., Introd aux Cout.*, n. 28 ; 11 Rép. Guyot, vo. *Mort civile*, p. 634 ; 2 Blackstone, 121 ; 1 *Id.*, 132, 133, note 16 ; C. N., 22. [I. 255.]

32. Condemnation to death carries with it civil death.—Pothier, *Cout. d'Orl., Intr.* n. 30 ; Richer, *Mort civile*, p. 26 ; Rép. Guyot, *eod. loc.*, 634 ; *Rochon vs Leduc*, 1 L. C. R., p. 252 ; C. N., 23. [I. 255.]

33. Civil death also results from the condemnation to any other corporal punishment for life.—1 Blackstone, 134 ; Rép. Guyot, *eod. loco* ; Richer, p. 26 ; Pothier. *Intr. aux Cout.*, n. 30 ; *Id., Des personnes*, 595 ; *Id., Des Successions*, 5. [I. 257.]

34. The disabilities which result as regards persons professing the catholic religion, from religious profession by solemn and perpetual vows made by them in a religious community recognized at the time of the cession of Canada to England and subsequently approved remain subject to the laws by which they were governed at that period.—Pothier, *Des personnes*, 587–8–9 ; *Id., Successions*, 125 ; *Id., Mariage*, n. 264 ; *Id., Intr. aux Cout.*, n. 28 ; Ord, 1667. *tit.* 20, *art.* 15, 16 ; Guyot, *loc. cit.* ; Richer, pp. 596, 607 et seq., 643, 647, 651, 660 ; 1 Blackstone, 132–3, note 16 ; 12 *Id.* 12. [I. 257.]

SECTION II.—OF THE EFFECTS OF CIVIL DEATH.

35. Civil death carries with it the loss of all the property of the party attainted, which is confiscated to the Crown.—Cout. de Paris, art. 183 ; 2 Blackstone, 381 ; Pothier, *Cout. d'Orl., Intr.*, n. 31 ; 11 Rép. Guyot, p. 637; 2 Pand. Franç., 174 ; Richer, 46, 337 ; C. N., 25. [I. 257.]

36. A person civilly dead,

1. Cannot take or transmit by succession.—*ff.* L. 18, *De bon. pos-*

Digitized by Google

sess.; 2 Pand. Franç., 183; Pothier, *Des personnes*, 587; 11 Rép Guyot, 637; Richer, 203, 208, 217 et seq.; Pothier, *Successions*, p 9; C. N., 25. [I. 257.]

2. He can neither dispose of nor acquire property, whether *inter vivos* or by will, and whether by gratuitous or onerous title; he can neither contract, nor possess property, but he may receive maintenance.—Pothier, *Des Personnes*, 587; N. Deniz., v. *aliments*, n. 24; 1 Argou, p. 16; 11 Rép. Guyot, 637; 1 Domat, *Liv. Prél.*, p. 106; 1 Pigeau, 66; 1 Bourjon, 128; 1 Duperrier, 36 et seq.; C. N., 25. [I. 257.]

3. He can neither be appointed tutor nor curator, nor take part in the proceedings relative to such appointment.—2 Pand. Franç., 185-6; Pothier, *Des Personnes*. 611; 11 Rép. Guyot, p. 637. [I. 257.]

4. He cannot be a witness to any solemn or authentic deed, nor can he be admitted to give evidence in a court of justice, or to serve as a juror.—*ff* L. 18, § 1, *Qui testam. facere;* L. 20; 2 Pand. Franç., 185-6; *ff* L. 3, *De testibus*, § 5; 11 Rép. Guyot, 637-8; Richer, 251, 254. [I. 259.]

5. He cannot be a party to a suit, either as plaintiff or defendant. —*ff* L. 2, *De cap minutis;* 2 Pand. Franç., 189, 190; Jousse, art. 8, tit. 11, De l'ord., 1667, p. 28; Rodier, sur do., p. 31; 1 Pigeau, p. 66. [I. 259.]

6. He is incapable of contracting a marriage that will produce any civil effect.—Pothier, Com. 20; *Id., Mariage*, 433, 440, 486; *Id., Successions*, c. 1, s. 2, art. 2 § 4; 11 Rép. Guyot, 638; Ord. 1639, art. 7; 2 Pand. Franç., 191 et seq. [I. 259.]

7. Marriage previously contracted by him is dissolved for the future, in so far as regards its civil effects only, the marriage tie subsists.—Pothier, *Successions*, 20; *Mariage*, 467; 3 Pand., Franç., 446 et seq.; Gousset, *Code Civil*, art. 227, pp. 94-5, art. 25, pp. 19, 20; 1 Malleville, pp. 41 et seq.; 1 Duranton, n. 225; 2 Duranton, 520; 1 Toullier, 285-6. [I. 259.]

8. His consort and his heirs may respectively exercise the rights and actions to which natural death would give rise; saving rights of survivorship, to which civil death only gives rise when that effect results from the terms of the marriage contract.—*ff* L. 121, § 2, *De verb. signif.;* 2 Pand. Franç., 198; 1 Demolombe. n. 210; Richer, p. 506; Lacombe, p. 459; 1 Toullier, n. 286. [I. 259.]

37. Civil death is incurred from the time of the sentence.—Pothier, *Successions*, c. 1, s. 1, pp. 5, 6; c. 3, p. 125-6; *Id., Des Personnes, tit.* 3, p. 596; 20 Merlin, Rép., vo. *Mort civile*, § 1, p. 432;

Digitized by Google

Richer, 143-4-6-7 ; 5 Merlin, vo. *Condamné*, n. 1, pp. 349, 350 ; *ff* L. 15, 1, *De interd. et releg.* ; L. 10, § 1, L. 29, *De pœnis.* ; Gousset, p. 21, sur art. 26. [I. 259.]

DECISIONS :—1. Le condamné à mort par la Cour Martiale en 1839 et qui a obtenu le pardon de Sa Majesté le 27 janvier 1844, ne peut pas ester en jugement et ne peut pas revendiquer sa propriété.—C.R.—Rochon vs. Leduc, I L. C. J., p. 252.

2. Une femme accusée du meurtre de son mari peut, dans l'époque intermédiaire de l'accusation et de la condamnation juridique, contracter un engagement valable pour se faire défendre de l'accusation.

Un avocat peut réclamer en justice le montant d'obligations à lui consenties par l'accusée pour se faire défendre, lorsqu'une preuve de surcharge ou de contrainte morale n'est faite.

Dans l'espèce, les biens de la femme condamnée ayant été confisqués au profit de la Couronne, cette dernière ne pouvait s'emparer des biens qu'à la charge de payer l'obligation contractée comme susdit, comme toute autre obligation ; et que si la Couronne n'eût pas fait remise des biens confisqués aux enfants de la condamnée, elle aurait été obligée d'acquitter ces obligations.

Les enfants ayant eu la remise de ces biens, sont aux droits comme aux obligations de la Couronne et par tant chargés de ces obligations.

Ces enfants ne sont cependant tenus que *pro modo emolumenti.*

Ils ne sont tenus de ces obligations que sur la part de leur mère dans la communauté, et non sur ses gains de survie qu'elle a perdus.—Loranger, J.—Gauthier vs. Joutras, I R. L., 473.

38. Pardon, liberation, and the remission of the penalty or its commutation to another which does not carry with it civil death, restore the civil ability of the person condemned, but without any retroactive effect, unless such effect be specially granted by act of parliament.—C. S. C., c. 99, s. 113. [I. 259.]

Digitized by Google

TITLE SECOND.

OF ACTS OF CIVIL STATUS.

CHAPTER FIRST.

GENERAL PROVISIONS.

39. In acts of civil status nothing is to be inserted, either by note or recital, but what it is the duty of the parties to declare.—C. N., 55. [I. 261.]

Amendments:—So far as the District of Saguenay is concerned, the Act intituled "An Act respecting the Registers of Civil Status in "a certain part of the District of Saguenay and the civil erection of "certain Parishes" and the Act intituled "An Act to amend the Act "thirty-fourth Victoria, chapter eight, respecting the Registers of "Civil Status in a certain part of the District of Saguenay," affect the provisions of this chapter.—Q. 34 Vict. cap. 8 and 35 Vict. cap. 17.

DECISION:—A *curé* inserted in his own handwriting in the civil register kept by him, not only the proper entry of a marriage solemnized by him, but added the words "*qu'il avait marié Sarah Côté, fille du demandeur, malgré l'opposition brutale de son père.*" In an action for damages instituted by the father, the *curé* was condemned to pay $100.—C. R.,—*Côté vs De Gaspé*, 16 L. C. R., p. 381.

40. In cases where the parties are not obliged to appear in person at the making of an act of civil status, they may be represented by an attorney, specially authorized to that effect.—C. N. 36. [I. 261.]

41. The public officer reads to the parties, or to their attorney, and to the witnesses, the act which he makes.—C. N. 37. [I. 261.]

42. Acts of civil status are inscribed in two registers of the same tenor, kept for each Roman-Catholic parish church, each Protestant church or congregation, or other religious community,

Digitized by Google

entitled by law to keep such registers, each of which is authentic, and has in law equal authority.—Ord. 1667, tit. 20, art. 8 ; Déclaration de 1736, art. 1 ; C. S. L. C., c. 20, ss. 1, 16 & 17. C. N., 40. [I. 261.]

DECISIONS :—1. The words "protestant churches or congregations," used in the statute 35 Geo. III, c. 4, which require rectors of parishes, &c., from 1st January, 1796, to keep two registers, both of which to be authentic, held to embrace only such churches and congregations as had their existence in the province when the statute was passed. — K. B.—*Spratt & The King*, Stuart's Rep. 149.

2. The registers of baptisms, marriages and deaths are only *prima facie* evidence of the truth of the declarations therein foreign to the celebration and herefore these declarations can be disproved by contrary evidence.—Q. B —*Sykes & Shaw*, 15 L. C. R., p. 304.

43. The registers are furnished by the churches, congregations or religious communities, and must be in the form prescribed by the Code of Civil Procedure.—C. S. L. C., c. 20, s. 1 § 2 ; C. N., 40. [I. 261.]

Amendments :—The duplicate registers for acts of civil status may be divided into three volumes, one for acts of birth, one for acts of marriage, and the third for acts of burial ; or into two volumes, one for acts of birth and of marriage, and the other for acts of burial.

Such volumes of the duplicate registers may be either blank, or may be prepared with printed forms, running consecutively through each volume ; but when one volume is used for acts of birth and of marriage, the first part shall contain, in such consecutive order, the forms for acts of birth, and the last part, in the same consecutive order, the forms for acts of marriage.

Whenever the duplicate registers are divided into volumes and are in printed forms, a sufficient number of blank pages shall be placed at the end of the volume for the acts of death mentioned in the two last sections.

An alphabetical index shall be made at the end of each duplicate of the register of civil status for each church, congregation or other religious community, by the person entitled by law to keep such registers.—Q. 41 Vict., cap. 8, sec. 1, 4 & 6.

✱ **44**. The registers are kept by the rector, curate or other priest or minister having charge of the churches, congregations, or religious communities, or by any other officer entitled so to do.—C. S. L. C., c. 20, s. 1 § 1 ; C. N. 40 [I. 261.]

Amendment :—1. Every Roman Catholic priest empowered by competent ecclesiastical authority to solemnize marriage, to administer baptism or to perform the rites of burial, for any particular church,

Digitized by Google

or chapel, or throughout any mission, shall be entitled to keep registers of civil status for such church, chapel or mission, and shall be deemed and held to be so entitled to keep the same and to have the same duly numbered, initialed and attested according to law.

2. Such priest, on presenting the duplicate register in order to have the same authenticated according to law, shall exhibit, if thereunto required, to the judge, prothonotary or clerk to whom he applies for such authentication, the authorization or certificate of authorization, or the letter of mission or of appointment given to him by the bishop, and empowering him to solemnize marriage, administer baptism or perform the rites of burial for such church, chapel or mission.

3. Every priest who shall have obtained authentic registers under this act shall keep them in duplicate, shall deposit one duplicate every year as required by law, and the other duplicate, which he shall retain, shall belong to the church or chapel, for which it was obtained and kept.

4. The provisions of the second title of the first book of the civil code, "of acts of civil status," as amended by the act of this province, thirty-second Victoria, chapter twenty-six, and the first chapter of the first title of the third part of the code of civil procedure, as also amended by the said last mentioned act, shall apply, in so far as they may consistently with this act, to the persons hereby empowered to keep registers, and also to the registers kept by them, in accordance with this act.

5. In the case of registers being applied for under this act for the use of any mission, they shall be granted under such name as the bishop shall have mentioned for that purpose in his certificate, and the duplicate retained annually by the priest, shall be deposited at the bishopric of the diocese to which the mission belongs; and for the purpose of authenticating copies or extracts from any such register and for all other purposes connected with such register, the bishop or his secretary shall be deemed and held to be the legal depositaries thereof.

6. And whereas certain duplicate registers of civil status have been kept by priests duly empowered by competent ecclesiastical authority to solemnize marriage, to administer baptism or to perform the rites of burial, but the said registers were not authenticated in the manner required by the civil code and the code of civil procedure; and whereas a large number of families are interested in having the said registers legalized, and it is expedient to provide for their

Digitized by Google

legalization and authentication; therefore, it is hereby futher enacted as follows:

7. Any register or registers of civil status hitherto kept in any Roman Catholic church by any Roman Catholic priest duly empowered by competent ecclesiastical authority to solemnize marriage, to administer baptism or to perform the rites of burial may, and shall, upon being presented for that purpose (notwithstanding that such registers have been used,) be numbered, initialed and attested by the proper civil functionary in the same manner and with the same effect as if the said registers had not been previously used, and one duplicate thereof may in like manner and with the like effect be deposited with and received by the proper civil functionary; and a certificate of the bishop shall be sufficient evidence of any priest having been duly empowered as above mentioned.

8. Whenever the provisions of the proceding section shall have been complied with in respect of any register, such register and any extract therefrom shall be deemed and held to be authentic, and to be as legal and valid as if they had been made and kept in accordance with all the requirements of the law.

9. The word " Bishop " means the ordinary of the diocese, or his vicar general, or the administrator of the diocese.

10. This act shall have no other effect than those of authorizing authentic registers to be kept and of legalizing those already kept, in the cases and in the manner herein above provided for, and shall have no other legal consequences, nor shall it in any wise affect, beyond its direct intent, the present civil position of parishes or *fabriques* now in existence.—Q. 36 Vict. cap. 16, ss. 1 to 10.

The death of any person detained in the provincial penitentiary, in a common jail or reformatory, under the authority of a judgment of a court or otherwise, but without necessitating the complaint or the requisition mentioned in the first section, shall be established in a register which shall, for the future, be kept in accordance with the provisions of title 2 of the Civil Code, by the warden of the penitentiary, the sheriff of the district in which such common jail is, or the guardian of such reformatory, as the case may be.—Q. 42-43 Vict., cap. 12, s. 4.

DECISIONS:—1. A dissenting minister of a protestant congregation, not being a public officer, nor a person in public holy orders recognized to be such by law, is not entitled to, and cannot keep a parish register for baptisms, burials and marriages.—K. B.—*Ex parte* Spratt, Stuart's Rep., p. 90.

2. A minister of a Presbyterian congregation, in communion with the church of Scotland, is entitled to registers for marriages, baptisms and burials, notwith-

Digitized by Google

standing that in the place where he officiates, another church, also in communion with the church of Scotland, has been previously established under the authority of the government. *Quære*, as to any right in the minister to fees for entries in such registers.—K. B.—*Ex parte Clugston*, Stuart's Rep., p. 448.

★ **45.** The duplicate register so kept, before it is used, must, at the instance of the party keeping it, be presented to one of the judges of the Superior Court or to the prothonotary of the district, or to the clerk of the Circuit Court instead of the prothonotary in the case specified in the statute 25 Vict., chap. 16, to be by such judge, prothonotary or clerk numbered and initialed in the manner prescribed by the Code of Civil Procedure.—C. S. L. C., c. 20, s. 1 § 2; C. N., 41. [I. 261.]

Amendments.— Article 45 of the civil code, is amended by striking out the words, " or to the clerk of the Circuit Court instead of the prothonotary in the case specified in the statute 25 Vict., chap. 16", in the said article, and substituting therefor the words " or to a clerk of the Circuit Court in the county. " —Q. 32 Vict., cap. 26, s. 2.

All registers which, since the coming into force of the code of civil procedure, have been authenticated by any clerk of the Circuit Court, and sealed with the seal of the said court, shall be held to have been, and to be, as legally authenticated as if article 1236 of the said code of civil procedure had originally been enacted as amended by section one of this act.—*Ibid.*, s. 7.

46. Acts of civil status, as soon as they are made, are inscribed in the two registers, in successive order and without blanks; erasures and marginal notes are acknowledged and initialed by all those who sign the body of the act. Everything must be written at length without abbrevation or figures.—C. S. L. C., c. 20, s. 1; C. N. 42. [I. 261.]

★ **47.** Within the first weeks of each year, the person who kept the said registers, or who has charge thereof, deposits in the prothonotary's office of the Superior Court of his district, or in the office of the clerk of the Circuit Court in the cases provided for in the statute already mentioned in the present chapter, one of the said duplicates, the delivery of which is acknowledged by a receipt which the said prothonotary or clerk is bound to give free of charge.—Cout. Paris, 241; Ord. de Blois, art. 181; Ord. de 1539, art. 51, 52, 53; Ord. de 1667, art. 8, tit. 20; C. S. L. C., c. 20, s. 8. [I. 261.]

Amendment:—Article 47 of the civil code is amended so as to read as follows:

Digitized by Google

" Within the first six weeks of each year, the person who kept the said registers, or who has charge thereof, deposits in the prothonotary's office, of the Superior Court of his district, one of the said duplicates, the delivery of which is acknowledged by a receipt which the said prothonotary is bound to give, free of charge."—Q. 32 Vict., cap. 26, s. 3.

★**48.** Within six months after such deposit, each prothonotary or clerk is bound to verify the condition of the registers deposited in his office, and to draw up a summary report of such verification.—Ord. 1667, tit. XX, art. XI. [I. 263.]

Amendment :—Art. 48 of the civil code is amended by striking out the words, " or clerk," in the said article.—Q. 32 Vict., cap. 26, s. 4.

★ **49.** The other duplicate register remains in the custody and possession of the priest, minister or other officer who kept the same, to be by him preserved and transmitted to his successor in office.—Ord. de 1667, tit. XX, art. 8, et Déclar. 1736, art. 19, 20, C. S. L. C., c. 20, s. 8; C. N., 43. [I. 267.]

Amendment :—Together with the copy of the portions of the civil code required by article 1237 of the code of civil procedure, to be attached to the duplicate register mentioned in the said article, a copy of this act shall likewise be attached.—Q. 32 Vict. cap. 26, s. 6. [I. 263.]

50. The depositary of either of the registers is bound to give extracts thereof to any person who may require the same; and such extracts, being certified and signed by him, are authentic.—C. S. L. C., c. 20, s. 8, § 2. C. N., 44. [I. 263.]

51. On proof that, in any parish or religious community no registers have been kept, or that they are lost, the births, marriages and deaths may be proved either by family registers and papers, or other writings, or by witnesses.—C. L. S. C., c. 20, s. 13; 2 Pand. Frac. 263; Ord. 1667, tit. XX, art. 14, et Décl. de 1736; C. N., 46. [I. 263.]

DECISIONS :—1. En l'absence de registres, l'état civil d'une personne ne peut être prouvé par les dires de ses parents et par témoins.—C. R.—***Motz vs. Moreau***, 15 L. C. R., p. 433.

2. Where registers do not exist of the birth of a person, such person has a right of action to establish by a judgment of the court the date and place of such birth, and he does not need to show any special interest to procure such judgment apart from the non-existence of such registers. The date of birth is an

Digitized by Google

important part of the status of a person giving him a right of action to establish such date.—Q. B.—*Lane & Campbell*, 8 L. C. J., p. 68.

3. The entry of a baptism in a non-authentic register where mention is made of the date of the birth of the person baptised, signed by both parents, is only *prima facie* proof of the birth at that date, and such date may be contradicted and disproved by oral testimony.—Q. B.—*Sykes & Shaw*, 9 L. C. J., p. 141.

4. Que lorsqu'il est prouvé par témoins qu'un homme et une femme ont contracté mariage, dans un endroit où il n'y avait pas de registres authentiques, et qu'ils ont vécu comme mari et femme, à la connaissance de tous les parents et du public, les enfants de cette union sont légitimes.

Que la preuve d'un mariage contracté dans cette Province, dans un endroit où il n'y a aucun membre du clergé ni registres de l'état civil, peut être faite par témoins, que la communauté de biens résulte de tel mariage et qu'il y a continuation de communauté suivant la loi, après le décès de l'un des époux, faute par le survivant de faire inventaire pour la dissoudre.—Q. B.—*Cutting & Jordan*, 10 R. L., p. 401.

5. Qu'un mariage contracté où il n'y a ni prêtres ni ministres ni magistrats ni aucune autorité religieuse ou civile et ni aucun régistre, peut être établi par preuve verbale, et que les admissions des parties, jointes à une longue cohabitation, sont la meilleure preuve et que le mariage dans ces circonstances, est valide, quoique pas accompagné de cérémonie civile ou religieuse.—CARON, J.—*Fraser vs. Pouliot*, 13 R. L., p. 1.

But in this case it was held in the Court of Queen's Bench that the evidence of long cohabitation of a white man and an Indian woman in the North West Territories, the woman having never received the title of wife, will not establish a valid marriage.—Q. B.—13 R. L., p. 520, 8 L. N., p. 178.

The Supreme Court, having decided the case on another issue, did not consider it necessary to pass upon this subject.—SUPREME COURT.—4 S. C. R., p. 515, 12 Q. L. R., p. 327, 10 L. N., p. 12.

See also cases noted at C. C. 135.

52. Every depositary of such registers is civilly responsible for any alteration made therein, saving his recourse, if any there be, against the party altering the same.—2 Pand. Franc., 278; Dard. sur art. 51; C. N. 51. [I. 263.]

★ **53.** Every infraction of any article of this title by any of the officers therein named, which does not amount to a criminal offence, and which is not punishable as such, is punished by a penalty not exceeding eighty dollars, nor less than eight.—Ord. 1667, tit. XX, art. 12, 13, 18; Décl. de 1736, art. 19, 33, 39; 2 Pand. Franc., 278; 2 Vict., c. 4, s. 2; C. S. L. C., c. 20, s. 9; C. N., 50. [I. 263.]

Digitized by Google

CHAPTER SECOND.

OF ACTS OF BIRTH.

54. Acts of birth set forth the day of the birth of the child, that of its baptism, if performed, its sex, and the names given to it; the names, surnames, occupation and domicile of the father and mother, and also of the sponsors, if any there be.—C. S. L. C., c. 20, s. 5; Ord. 1667, tit. XX, art. 9; Décl. 1736, art. 4; C. N. 57. [I. 263.]

DECISION:—Que la Cour Supérieure peut autoriser un individu à changer l'un de ses prénoms et faire entrer ce changement au régistre de l'état civil.—TORRANCE, J.—*In re Hugh Andrew Allan*, 15 R. L., p. 16.

See also English case noted at 11 L. N., p. 161.

55. These acts are signed in both registers, by the officer officiating, by the father and mother if present, and by the sponsors if any there be; if any of them cannot sign, their declaration to that effect is noted.—C. S. L. C., c. 20, s. 5, § 2; Ord. 1667, tit. 20, art. 10; C, N. 39. [I. 263.]

56. When the father and mother of any child presented to the public officer are either or both of them unknown, the fact is mentioned in the register.—C. S. L. C., c. 20, s, 5 § 3; C. N. 55, 56, 58. [I. 265.]

CHAPTER THIRD.

OF ACTS OF MARRIAGE.

57. Before solemnizing a marriage, the officer who is to perform the ceremony must be furnished with a certificate establishing that the publication of bans required by law has been duly made unless he has published them himself, in which case such certificate is not necessary.—Pothier, *Mariage*, Nos 66 to 84, 349; C. N. 63. [I. 265.]

58. This certificate, which is signed by the person who published the bans, mentions, as do also the bans themselves, the names, surnames, qualities or occupations and domiciles of the parties to be married, and whether they are of age or minors; the names, surnames,

Digitized by Google

occupations and domiciles of their fathers and mothers, or the name of the former husband or wife. And mention is made of this certificate in the act of marriage.—Pothier, *Mariage*, Nos 66 et seq. ; Ord. de Blois, art. 40 ; 2 Pand. Franc., 320-1 ; C. N., 63, 166. [I. 265.]

★ **59.** The marriage ceremony may however be performed without this certificate, if the parties have obtained and produce a dispensation or license, from a competent authority, authorizing the omission of the publication of bans.—Pothier, *Mariage*, loc. cit. & No 70 ; Ord. de Blois, art. 40 ; C. S. L. C., c. 20, s. 6 ; C. N., 63. [I. 265.]

Amendment:—1. In so far as regards the solemnisation of marriage by Protestant ministers of the Gospel, all marriage licenses shall be issued from the office of the Provincial Secretary, under the hand and seal of the Lieutenant-Governor, who, for the purposes of such licenses, shall be the competent authority under article 59 of the Civil Code.

2. In so far as regards the solemnisation of marriage by Protestant ministers aforesaid, no marriage license, issued in any other manner, or from any other authority, shall be necessary.

3. The licenses issued under this act shall be furnished by such persons as the Lieutenant-Governor in Council shall name for that purpose, to all persons requiring the same, who shall previously have given bond, together with two sureties being householders, and in the form appended to this act.

4. Every person furnishing such licenses shall, for every license, receive, from the person requiring the same, the sum of eight dollars, out of which sum he shall retain, for himself, such portion, not exceeding two dollars, as the lieutenant-governor shall allow, and he shall pay over the remainder of the said sum to the treasurer of the province, at such time or times as the said treasurer shall direct.

5. The sums so paid over to the treasurer shall be by him paid over annually, at such time and in such manner that the same shall be apportioned among the Protestant institutions of superior education, by the Minister of Public Instruction, under authority of the Lieutenant-Governor in Council, in addition to and in the same manner as any sums or aid granted by law for the purposes of Protestant superior education in this province.

6. No minister who has performed any marriage ceremony, under the authority of a license issued under this act, shall be subject to any action or liability, for damages or otherwise, by reason of there being any legal impediment to the marriage, unless, at the time

Digitized by Google

when he performed such ceremony, he was aware of the existence of such impediment.

7. This act shall come into force on the first of July, one thousand eight hundred and seventy-two, and not before.—Q., 35 Vict., c. 3.

60. If the marriage be not solemnized within one year from the last of the publications required, they are no longer sufficient and must be renewed.—3 Nouv. Denizart, vo. *Bans de Mariage*, p. 111 ; 2 Pand. Franç., 328 ; 2 Merlin, Rép., vo. *Bans*, p. 442 ; 2 Guyot, Rép., vo. *Bans*, p. 175 ; 1 Toullier, n. 567 ; C. N., 65. [I. 265.]

61. In the case of an opposition, the disallowance thereof must be obtained and be notified to the officer charged with the solemnisation of the marriage.—Pothier, *Mar.*, No. 82 ; Guyot, Rép. *Opposition à un mariage, alin.* 1, 2 ; Ferrière, Dict. de Droit, *iisdem verbis.* [I. 265.]

62. If, however, the opposition be founded on a simple promise of marriage, it is of no effect, and the marriage is proceeded with as if no such opposition had been made.—C. S. L. C., c. 34, s. 4. [I. 265.]

63. The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere the person officiating is obliged to verify and ascertain the identity of the parties. For the purposes of marriage, domicile is established by a residence of six months in the same place.—Fenet-Pothier, p 18 ; Pothier, *Mariage*, 356 ; C. N., 74. [I. 265.]

64. The act is signed by the officer who solemnizes the marriage, by the parties, and by at least two witnesses, related or not, who have been present at the ceremony ; and if any of them cannot sign, their declaration to that effect is noted.—C. S. L. C., c. 20, s. 6. [I. 267.]

65. In this act are set forth :

1. The day on which the marriage was solemnized ;

2. The names, surnames, quality or occupation and domicile of the parties married, the names of the father and mother of each, or the name of the former husband or wife ;

3. Whether the parties are of age, or minors ;

4. Whether they were married after publication of bans, or with a dispensation or licence ;

Digitized by Google

5. Whether it was with the consent of their father, mother, tutor or curator, or with the advice of a family council, when such consent or advice is required;

6. The names of the witnesses, and whether they are related or allied to the parties, and if so, on which side, and in what degree;

7. That there has been no opposition, or that any opposition made has been disallowed. —Pothier, *Marriage*, 375; C. S. L. C., c. 20, s. 6, § 1 & 2; C. N. 76. [I. 267.]

CHAPTER FOURTH.

OF ACTS OF BURIAL.

★ **66.** No burial can take place before the expiration of twenty-four hours after the decease; and whoever knowingly takes part in any burial before the expiration of such time, except in cases provided for by police regulations, is subject to a penalty of twenty dollars.—C. S. L. C., c. 21, s. 1; C. N. 77. [I. 267.]

67. The act of burial mentions the day of the burial, and that of the death, if known; the names, surnames, and quality or occupation of the deceased; and it is signed by the person performing the burial service, and by two of the nearest relations or friends there present; if they cannot sign, mention is made thereof. —C. S. L. C., c. 20, s. 7; Ord. 1667, tit. 20, art. 20; Décl. de 1736, art. 10; 2 Pand. Franç., 382; C. N. 79. [I. 267.]

68. The provisions of the two preceding articles apply to religious communities and hospitals where burials are permitted.—Ord. 1667, *tit.* 20, art. 13; C. S. L. C., c. 20, s. 11; C. N., 80. [I. 267.]

★ **69.** When there is any sign or indication of death having been caused by violence, or when there are other circumstances which give reason to suspect it, or when the death happens in any prison, asylum, or place of forcible confinement other than lunatic asylums, the burial cannot be proceeded with until it is authorized by the coroner or other officer whose duty it is to inspect the body in such cases. —Décl. 20 Sept. 1712; 20 Isambert, p. 574; Décl. 1736, art. 12; 1 Jousse, p. 306; 1 Russell, on *Crimes*, 468; 1 Blackstone, 265, note 27; 4-5 Vict., c. 24.—C. N., 81. [I. 267.]

Digitized by Google

Amendments :—The Acts Q. 36 Vict., cap. 29 & 38 Vict., cap. 36 amend C. S. C., cap. 76, intituled : " An act respecting the practice of Physic and Surgery and the study of anatomy," as follows :—

The second section of the said act is amended so as to read in manner following :

" The bodies of persons found dead and publicly exposed, or of those who, immediately before death, had been supported by any public institution receiving aid from the provincial government, shall be delivered to the persons hereinafter mentioned, unless they be claimed within the usual period for interment, by relations not further removed than in the third degree, and such degree of relationship shall be established by the oath of the claimant. "

The fourth section of chapter seventy-six of the Consolidated Statutes of Canada is repealed, and the following substituted therefor :

" 4. The lieutenant-governor may appoint, during pleasure, a person, not being a medical practitioner, and unconnected with any public or private school of medicine, to be the inspector of anatomy, for each city, town or place, in which there is any public institution or medical school as aforesaid. "

Sub-section one of section two and section eight of chapter twenty-one of the Consolidated Statutes for Lower Canada, intituled : " An Act respecting Interment and Disinterments, " are amended to read as follows :

" 2. On a petition being presented to any judge of the superior court, either in term or in vacation, by any person praying for leave to disinter a body or bodies buried in any church, chapel or burial-ground with a view to erection, repair or alienation of a church, chapel or burial-ground, or with a view to re-interment of the said body or bodies, in another part of the same church, chapel or burial-ground, or in another church, chapel or burial-ground, or with a view to the reconstruction or repair of the tomb or coffin in which a body has already been buried, and indicating, in the case of a proposed removal of any body or bodies, the part of the same church, chapel or burial-ground, or the church, chapel or burial-ground, to which it is proposed to effect the removal, and on proof being made on oath to his satisfaction of the truth of the allegations contained in such petition, such judge may ordain that the body or bodies shall be disinterred as prayed for."

8. Before proceeding to any disinterment in any roman catholic church, chapel or burial-ground, under this act, permission to that effect shall be obtained from the superior ecclesiastical authority of

Digitized by Google

the roman catholic diocese, in which the same is situate. "—Q. 39, Vict. cap. 18.

See also an Act intituled: "An Act respecting the compilation of statistics of births, marriages and causes of death in the Province."—Q. 39 Vict., cap. 20.

Whenever, in accordance with the provisions of chapter 76 of the Consolidated Statutes of Canada and the acts amending the same, a body shall have been delivered, before burial, to a school of medicine or to a university, an act of death shall be inscribed, by the person charged with such duty, in the duplicate registers for acts of civil status; and such act of death shall have the same effect as an act of burial and shall take the place thereof.

The inspector of anatomy shall be bound, within a delay of three days, to appear before the rector, curate, or other priest or minister of a church of the religion to which the deceased belonged, and to cause such act of death to be inscribed. It shall contain the day of the death, the names, surname, and quality or occupation of the deceased, and mention of the place where the body was found, or of the institution where the death occured, and of the school of medicine or university to which the body has been delivered; and it is signed by the inspector of anatomy and by the person inscribing the act.—Q. 41 Vict., cap. 8, ss. 2 & 3.

Section 4 of chapter seventy-six of the Consolidated Statutes of Canada is amended so as to read as follows:

" 4. The Lieutenant Governor in council shall appoint at pleasure, any coroner or physician, not attached to any public or private school of medicine, or any other qualified person, to be inspector of anatomy for any city, town or locality where there is a public institution or school of medicine, as aforesaid."—Q. 42-43 Vict., cap. 38.

1. For the purposes of this act, the province of Quebec shall be divided into two sections, which shall be known as "The Quebec Section," and " The Montreal Section;" which sections shall respectively comprise such judicial districts as the Lieutenant Governor in Council may be pleased to specify.

It shall be lawful for the Lieutenant Governor in Council to appoint, during pleasure, an Inspector of anatomy, for each of such sections, and a Sub-Inspector of anatomy for each judicial district, except for those of Quebec and Montreal, in which the office shall be filled by the Inspector of anatomy; but the Inspectors, so appointed, shall not be connected in any manner with any University or School of Medicine.

Digitized by Google

2. The body of every person, found dead and publicly exposed, or of any person who, immediately before his death, was supported by some public institution, receiving a grant from the provincial government, shall, through the Inspector or Sub-Inspector of anatomy, be delivered to the universities or schools of medicine in this Province, to be used in the study of anatomy and surgery, unless such body be, within twenty-four hours after death, claimed by persons, solemnly affirming, before the Inspector or Sub-Inspector of anatomy, in the discretion of these officers, that they are relatives of the deceased within the degree of cousin german inclusively.

3. Every superintendent or director of a public Institution so receiving public money, in which one of the patients in his charge shall have died, shall, within forty-eight hours of the death, notify the Inspector or Sub-Inspector of anatomy thereof.

Every coroner, whether he does or does not hold an inquest on any body found publicly exposed and unclaimed, shall also immediately notify such Inspector or Sub-Inspector thereof.

In no case shall a body, unclaimed as aforesaid, be delivered up, except upon the order of the Inspector or Sub-Inspector of anatomy, and to the person who shall be mentioned in such order, except in the case of death from contagious disease, the fact of which is established by a physician.

4. The notice, given to the Inspector or Sub-Inspector of anatomy, in virtue of the preceding section, shall set forth the names and surnames (if known), the sex, age, status, religion, nationality, occupation, date of decease and the illness or other cause of death of the deceased.

The Sub-Inspector shall:

(1.) Forthwith transmit to the proper section Inspector the notice which he has received, as well as the corpse which has been delivered to him, and

(2.) Deliver the corpses at his disposal to the Inspector of anatomy of his section only, under a penalty of a fine of fifty dollars for each corpse otherwise delivered.

5. Each Inspector of anatomy shall:

(1.) Keep a register, in which he shall enter at length the notices he shall receive under section 3 of this act, as well as the name of the university or school of medecine to which he shall have delivered a corpse;

(2.) Impartially distribute to the universities or schools of medicine, each in their turn and in proportion to the number of students in each of them, the bodies so placed at his disposal;

Digitized by Google

(3.) Not distribute any bodies except to the Universities or schools of medicine in this Province in conformity with the provisions of this act, under penalty of a fine of fifty dollars for each body otherwise delivered;

(4.) Carefully inspect the dissecting rooms, at least once a week, and order that, after dissection, the remains of each body be removed and decently interred in a cemetery belonging to the religious denomination of the deceased.

6. The Superintendent or Director of every University or school of medicine shall also keep a register, in which he shall enter the names and surnames (if known), the sex, and the date of the reception of every body supplied to him by the Inspector of anatomy, as well as the date at which such body is delivered to the said Inspector for burial, and the name of the cemetery in which the remains were buried after dissection.

7. Every University or school of medicine shall pay to the Inspector of anatomy, in addition to the cost of transport and burial, a sum of ten dollars for every body delivered, and the Inspector shall pay to the Sub-Inspector, for every body which the latter shall deliver to him, the sum of five dollars over and above the cost of transport.

8. Every Superintendent or director of a public institution, receiving a grant from government, and every coroner who shall knowingly omit or who shall neglect or refuse to comply with the provisions of this act, and every university or school of medicine, which shall receive bodies in its dissecting rooms or allow the dissection, within its establishment, of bodies which have not been supplied to it by the Inspector of anatomy, in accordance with this act, shall, upon a complaint to that effect before a Justice of the Peace by the Inspector or Sub-Inspector, be liable to a penalty of not less than one hundred and not more than two hundred dollars for each offence; and the amount of such penalties and costs of suit shall be retained by the Provincial treasurer out of the then next grant which such Institution, University, or school of medicine is to receive, or shall be retained from the emoluments which may become payable to such coroner, as the case may be.

9. Whenever, under the provisions of this act, a body has been delivered, before burial, to a school of medicine or a university, the Inspector or Sub-Inspector of anatomy, who shall have delivered it, shall be bound to appear within eight days, in the place where the death occurred, before the *curé*, priest or minister of the religious denomination, to which the deceased belonged, and to cause to be

Digitized by Google

entered, upon the register of civil status, a certificate of death, which shall have the same effect as the certificate of burial and take the place thereof; and in default of his so appearing, he shall incur, for each omission to do so, a fine not exceeding fifty dollars.

Such certificate shall state the day of the death, the names and surname, the status, calling, and age of the deceased, the name of the institution in which he died or the place where he was found, and it shall be signed by the Inspector or Sub-Inspector of anatomy, as the case may be, and by the person making out such certificate.

Every Inspector of anatomy shall make to the Provincial Secretary, on the first day of October in each year, a general report of his operations.

All the provisions of chapter seventy-six of the Consolidated Statutes of Canada, with respect to anatomy, and of the Acts of this Province, 36 Vict., chap. 29, 38 Vict., chap. 36, 41 Vict., chap. 8, sections 2, 3 and 5, and 42-43 Vict., chap. 38, are hereby repealed.

This act shall come into force on the day of its sanction.—Q. 46 Vict., cap. 30.

CHAPTER FIFTH.

OF ACTS OF RELIGIOUS PROFESSION.

70. In every religious community in which profession may be made by solemn and perpetual vows, two registers of the same tenor are kept, in which are inscribed the acts establishing the taking of such vows.—Ord. 1667, titre 20, art. 15; Décl. 1736, art. 25; Serpillon, pp. 332-7-8; Sallé, 234-5-7, p. 236, note (*a*). [I. 269.]

71. [These registers are numbered and initialed like the other registers of civil status, and the acts are inscribed therein in the manner prescribed in article 46]—Ord. 1667, art. 16; Décl. 1736, art. 25; Serpillon, 332; Sallé, 236. [I. 269.]

72. The acts set forth the names and surnames, and the age of the person making profession, the place of her birth and the names and surnames of her father and mother.

They are signed by the party, by the superior of the community, by the bishop or other ecclesiastic who performs the ceremony, and by two of the nearest relations, or by two friends who were present. —Décl. 1736, art. 27-28. [I. 269.]

Digitized by Google

73. The registers are used during five years, after which one of the duplicates is deposited in the manner declared in article 47, and the other remains with the community to form part of its records.—Décl. 1736, art. 8. [I. 269.]

74. Extracts of such registers, signed and certified by the superior of the community, or the depositary of one of the duplicates, are authentic, and are delivered by one or other of them at the option and on the demand of those requiring them.—Décl. 1736, art. 29. [I. 269.]

CHAPTER SIXTH.

OF THE RECTIFICATION OF ACTS AND REGISTERS OF CIVIL STATUS.

75. If an error have been committed in the entry made in the register of an act of civil status, the court of original jurisdiction in the office of which such register is or is to be deposited may, at the instance of any interested party, order such error to be rectified in presence of the other parties interested.—Ord. 1667; Déclar. de 1736, art. 30; 1 Encyclopédie de Droit, Sebire et Carteret, pp. 205-6; Merlin, Rép., vo. *Actes de l'état civil;* 1 Rogron, C. C., art. 99, p. 85; C. P. C., art. 855; 35 Geo. III., c. 4, s. 13; C. N., 99. [I. 269.]

DECISIONS:—1. Le curé est témoin compétent sur une inscription en faux contre un régistre de mariage.—C. R.—*Languedoc vs. Laviolette*, M. C. R., p. 77.

2. An *extrait de baptême* may be explained by verbal testimony.—K. B.—*Poulin vs. Thibault*, 2 R. de L., p. 332.

3. On ne peut par voie d'action, demander la rectification d'un régistre en y retranchant des mots constatant des faits accessoires, qui ne touchent en rien au caractère de l'acte ni à l'état civil des personnes.—C. R.—*Coté vs. DeGaspé*, 16 L. C. R., p. 381.

4. Sur une requête pour la rectification d'un acte de naissance dans les régistres d'une paroisse, la cour, avant faire droit, peut ordonner que la délimitation de cette paroisse soit constatée et établie par un arpenteur, suivant son érection civile.—BERTHELOT, J.—*Dérozan vs. Véniard*, 17 L. C. J., p. 49.

5. Entries in the registers of births, marriages and deaths, may be amended by order of the court on application and due proof.—BADGLEY, J.—*Ex parte Denis*, 1 L. C. L. J., p. 97.

76. The depositaries of the registers, on receipt of a copy of any judgment of rectification, are bound to inscribe the same on the margin of the act so rectified, and if there be no margin, then on a sheet of paper which remains annexed thereto.—Décl. 1736, art. 30. [I. 271.]

Digitized by Google

77. [If an act which ought to have been inserted in the register be entirely omitted, the same court may, at the instance of one of the parties interested, the others being notified, order that such omission be supplied, and the judgment so ordering is inscribed on the margin of the said register, at the place where the act so omitted ought to have been entered, and if there be no margin, then on a sheet of paper which remains annexed thereto]—35 Geo. 3, ch. 4, sec. 11,13; 1 Malleville, 375; Ord. 1667, tit, 20, art. 14; Serpillon, pp. 338 à 341; Décl. 1736, art. 30; 1 Jousse, p. 321; Rodier, p. 356 et seq.; 1 Bornier, 160; 27 Merlin, p. 263, 11, Do, 148; C. P. C., art. 855; 1 Toullier, Nos. 342, 350, C. N., 99. [I. 271.]

78. The judgment of rectification cannot, at any time, be set up against those who did not seek it, or who were not duly notified.—2 Pand. Franc., sur art. 100, p. 406; Rogron, sur *ibid.*, p. 85; C. N., 100. [I. 271.]

TITLE THIRD.

OF DOMICILE.

79. The domicile of a person, for all civil purposes, is at the place where he has his principal establishment.—Cod. L. 7, *De incolis*; Pothier, *Introd. aux Cout.*, 8, 20; *Id.*, *Mariage*, 355, Merlin, Rép., vo *Domicile*, § 2, nos 3, 4; 2 Pand. Franç., 409, 413; 1 Toullier, nos 364-6; C. N., 103-6. [I. 271.]

80. Change of domicile is effected by actual residence in another place, coupled with the intention of the person to make it the seat of his principal establishment.—Pothier, *Introd. aux Cout.*, 14; *ff.* L. 4 et 20, *ad municipalem et de incolis*; 1 Toullier, p. 323; C. N., 103. [I. 271.]

DECISIONS:—1. A temporary change of residence does not effect a change of domicile. It must appear that the person has the intention of remaining permanently at his new place of residence, or of making it the seat of his principal establishment.—TORRANCE, J.—*Waldron vs. Brennan*, 23 L. C. J., p. 268, 2 L. N., p. 333.

2. The parties were married in New-York, where they had their domicile,

Digitized by Google

but the husband afterwards changed his domicile to the Province of Quebec. After this change of domicile the wife obtained a divorce in the Supreme Court of New-York State, the husband appearing in the suit and not contesting.—HELD; (reversing the judgment of Torrance, J., 5 L. N. p. 79.)

That divorce not being recognized by the law of the Province of Quebec, which was the domicile of the husband and wife, the decree obtained by the latter in New-York had no binding effect in Quebec and that, notwithstanding such decree, the parties were still husband and wife; and therefore, the wife cannot bring an action against her husband to account without being authorised. —Q. B.—*Fisk & Stevens*, 3 Q. B. R. p. 293, 6 L. N., p. 329.

But this decision was reversed by the Supreme Court.—See 8 L. N., p. 42 & Cassel's Digest S. C. R., p. 134.

3. To constitute a matrimonial domicile there must be the fact of residence coupled with the intention to remain in the place. Where the husband declared in the act of marriage that his domicile was in Quebec, such declaration in the presence of the officer who performed the ceremony, and whose duty it was to ascertain and set forth the domicile of the parties married, must be considered a formal declaration of intention sufficient to establish the matrimonial domicile; and even apart from this, in the present case, the facts show that Quebec was the matrimonial domicile.—Q. B.—*Wadsworth & McCord*, M. L. R., 2 Q. B., p. 113, 11 Q. L. R., p. 232.

But this judgment was reversed by the Supreme Court, it holding that there was not sufficient evidence to prove a domicile in the Province of Quebec.—Supreme Court.—12 S. C. R., p. 466.

4. Qu'Alexandre Fraser n'a jamais perdu le domicile de sa naissance dans la province de Québec, malgré son absence prolongée dans le Nord-Ouest.—Q. B. —*Fraser & Pouliot*, 13 R. L., p. 1 & p. 520, 8 L. N., p. 78, 2 Q. L. R., p. 327, 10 L. N., p. 12.—Supreme Court, 4 S. C. R., p. 515, 12 Q. L. R., p. 327.

5. The circumstances in this case do not show that the Defendant's domicile was changed to Lower Canada, either before or at the time of the marriage.—TORRANCE, J.—*Converse vs. Converse*, 5 L. N., p. 69.

81. The proof of such intention results from the declarations of the person and from the circumstances of the case.—C. N., 104. [I. 271.]

82. A person appointed to fill a temporary or revocable public office, retains his former domicile, unless he manifests a contrary intention.—Pothier, *eod. loc.*, 9, 15; Cod. L. 2, *De incolis;* C. N., 106; C. L., 46. [I. 271.]

DECISION:—Une personne nommée à un office temporaire dans un lieu où elle s'est transportée seule, laissant néanmoins sa famille pour quelque temps encore au domicile qu'elle avait lors de sa nomination, n'est pas censée avoir changé son domicile, et l'avis de protêt d'un billet par elle endossé, laissé à son ancien domicile, est valable, et suffisant pour la rendre responsable du paiement de tel billet.—Q. B.—*Ryan & Malo*, 12 L. C. R., p. 8.

83. A married woman, not separated from bed and board, has no other domicile than that of her husband.

Digitized by Google

The domicile of an unemancipated minor is with his father and mother, or with his tutor.

The domicile of a person of the age of majority interdicted for insanity is with his curator.—Pothier, *loc. cit.*, 10, 11, 12, 18, 19; *Id.*, *Mariage*, 357; 2 Pand. Franç., p. 423; C. N., 108; C. L., 48. [I. 273.]

84. The domicile of persons of the age of majority who serve or work continuously for others, is at the residence of those whom they serve or for whom they work, if they reside in the same house. —*ff. loc. cit.* L. 6, § 3; L. 22; Merlin, Rép., vo. *Domicile*, § 4, No. 1; 2 Pand. Franç., 227; 1 Bourjon, p. 90; C. N., 109. [I. 273.]

85. When the parties to a deed have for the purpose of such deed, made election of domicile in any other place than their real domicile, all notifications, demands and suits relating thereto may be made at the elected domicile, and before the judge of such domicile. —Loyseau, des Seigneuries, c. 14, n. 15; Bacquet, *Droits de justice*, c. 8, n. 16; Raviot, *Quest.*, 297, n. 21; 8 Merlin, Rép., vo. *Domicile élu*, § 2, édit. in-8; Dard, pp. 26, 27; 2 Pand. Franç., 431; C. N., 111. [I. 273.]

DECISION:—Where a contract, bearing date at Montreal, is proved to have been made at Toronto, Ontario, the cause of action arises in Ontario.—TORRANCE, J.—*Railway & Newspaper Advertising Co., vs Hamilton*, 20 L. C. J., p. 28.

See also cases noted against article 34 in Foran's C. C. P.

TITLE FOURTH.

OF ABSENTEES.

GENERAL PROVISION.

86. An absentee, within the meaning of this title, is one who, having had a domicile in Lower Canada, has disappeared, without any one having received intelligence of his existence.—1 Malleville, 127, 116; De Moly, Absence, 5; 2 Esprit du Code, 281; 1 Toullier, no. 381; Encyclopédie de Droit, 42. [I. 273.]

Digitized by Google

CHAPTER FIRST.

OF CURATORSHIP TO ABSENTEES.

87. If it be necessary to provide for the administration of the property of an absentee who has no attorney, or whose attorney is unknown or refuses to act, a curator may be appointed for that purpose.—Bretonnier, *Quest. de droit*, vo. *Absent*, c. 3, p. 7 ; Nouv. Denizart, vo. *Absence*, p. 56 ; C. S. L. C., c. 86, s. 2 et seq. ; Biret, *Traité de l'absence*, p. 21 ; Rogron sur art. 112 ; C. N., 112. [I. 273.]

DECISION:—The mother may be appointed curatrix to her absent son.—TORRANCE, J.—*Ex parte, Emelina Valiquette*, 7 L. N., p. 70.

88. The necessity for such appointment is determined, at the instance of those interested, on the advice of a family council called and composed in the manner provided in the title *Of Minority, Tutorship and Emancipation*, and homologated by the Court, or by one of its judges, or by the prothonotary.—C. S. L. C., c. 86, s. 2 et seq. ; c. 78, s. 23. [I. 273-275.]

89. Curators to the property of absentees make oath faithfully to fulfil the duties of their office and to account.—2 Pigeau, pp. 510, 511 ; C. L., 52. [I. 275.]

90. The curator is bound to cause to be made, in notarial form, a faithful inventory and valuation of all the property committed to his charge, and for his administration he is liable to the same obligations as those to which tutors are subject.—Pigeau, *eod. loc.* ; C. L., 52. [I. 275.]

91. The powers of such curator extend to acts of administration only ; he can neither alienate, pledge nor hypothecate the property of the absentee.—Encyclop. de Droit, vo. *Absent ;* Arrêtés de Lamoignon, tit. 6, *Des Absents*, pp. 37 et seq. ; Jurisp. du code civil, par Bavoux et Loyseau, pp. 137 et seq. [I. 275.]

DECISIONS:—1. The curator to a vacant estate of an absentee cannot be impleaded in his quality of curator for debts due by the absentee. The only mode of impleading an absentee is by calling him in by an advertisement under the provisions of the 94th section of the Judicature Act, 12 Vict., cap. 38.—C. R.—*Whitney vs. Brewster*, 3 L. C. R., p. 431.

Digitized by Google

2. An action to account lies against the curator to an absentee at the instance of any of the creditors, he being the *mandataire* of all the creditors, and in such a case it is not necessary to call in the absentee by advertisement, but service on the curator is sufficient.—C. R.—*Murphy vs. Knapp*, 4 L. C. R., p. 94.

3. Un curateur à l'absent qui intente *ès-qualité* une action pétitoire qui est déboutée parce qu'il n'a pas en loi le droit d'intenter une telle demande qui est une action réelle, peut être condamné personnellement aux dépens de cette action.—LORANGER, J.—*St. Jacques vs. Parent*, 2 R. L., p. 95.

4. That an action does not lie, against the curator to an absentee, for a debt due by such absentee.—ANDREWS, J.—*Lepage vs. Monier*, 12 Q. L. R., p. 9.

92. The curatorship to the absentee is brought to an end :

1. By his return ;

2. By his sending a power of attorney to the curator or to any other person ;

3. By his heirs being authorized to take provisional possession of his property, in the cases provided by law.—Sebire et Carteret, Encyclop. de Droit, vo. *Absent* ; Arrêtés de Lamoignon, tit. 6, pp. 37 et seq.; Jurisp. du Code Civil, par Bavoux et Loyseau, p. 137. [I. 275.]

CHAPTER SECOND.

OF THE PROVISIONAL POSSESSION OF THE HEIRS OF ABSENTEES.

93. Whenever a person has ceased to appear at his domicile or place of residence, and has not been heard of for a period of [five] years, his presumptive heirs at the time of his departure or of the latest intelligence received, may obtain from the court authority to take provisional possession of his property, on giving security for their due administration of it.—Pothier, *Intr. à la Cout. d'Orl.*, tit. 17, n. 37 ; *Id. Des Successions*, c. 3, s. 1, § 1 ; Bretonnier, *Quest. de Droit*, c. 3, pp. 7 et 8 ; 3 Pand. Franç., 3 ; C. N., 115 ; C. L., 58. [I. 277.]

DECISION :—Under the circumstances disclosed in this case the Respondents could not claim the share of E. Dufresne, whose domicile is known.—Q. B.—*Bulmer & Dufresne*, 3 Q. B. R., p. 90.—SUPREME COURT, C. D., p. 533.

94. Provisional possession may be authorized before the expiration of such delay, if it be established to the satisfaction of the court that there are strong presumptions that the absentee is dead.—Bretonnier, vo. *Absents*, c. 3, p. 7 ; Encyclop. de Droit, p. 44 ; Lebrun, *Successions*, liv. 1, c. 1, sec. 1, n. 5 ; Arrêt du 2 janvier 1634 & 23 mars 1688 ; 2 Bretonnier, sur Henrys, liv. 4, quest. 46 ; 3 Pand. Franç.,

Digitized by Google

p. 14; 10 Nouv. Denizart, vo. *Absent*, p. 62; C. N., 117; C. L., 61. [I. 277.]

DECISION :—The period at which the heirs of an absentee are entitled to *envoi en possession*, must be determined by the legal direction of the court, according to circumstances.—K. B.—*Ex parte, Bellet*, 2 R. de L., p. 277.

95. In pronouncing on such demand, the court takes into account the reasons of the absence and the causes which may have prevented the reception of intelligence concerning the absentee.—Pothier, *Introd. Cout. d'Orl.*, tit. 17, n. 37; Lebrun, *Successions*, loc. cit.; C. N., 117; C. L., 62. [I. 277.]

96. Provisional possession is a trust which gives to those who obtain it, the administration of the property of the absentee and makes them liable to account to him or to his heirs and legal representatives.—C. N., 125. [I. 277.]

DECISION :—No action *en révendication*, can be maintained by the presumptive heir to the estate and succession of an absentee, if he be not curator to the estate of such absentee, or entitled to the possession by virtue of an *envoi en possession*, or a final *délivrance* of the estate and succession.—K. B.—*Gauvin vs. Caron*, Stuart's Rep., p. 136.

97. Those who have obtained provisional possession are bound to make an inventory, before a notary, of the moveable property and title deeds of the absentee, [and to cause the immoveable property to be visited by skilled persons for the purpose of ascertaining its condition. Their report is homologated by the court, and the costs are paid out of the absentee's property.]

The court which granted the possession may, if there be ground for it, order the sale of the moveables or of any part of them; in which case, the price of such sale is invested, as are also all rents, issues and profits accrued.—Biret, *Absence*, p. 129, C. N. 126. [I. 277.]

98. If the absence have continued during thirty years from the day of the disappearance, or from the latest intelligence received, or if a hundred years have elapsed since his birth, the absentee is reputed to be dead from the time of his disappearance or from the latest intelligence received; in consequence, if provisional possession have been granted, the sureties are discharged, the partition of the property may be demanded by the heirs or others having a right to it, and the provisional possession become absolute.—Biret, *Absence*, pp. 245, 248; Arrêtés de Lamoignon, *Absents*, c. 6, art. 4, p. 38; 2 Lamoignon, *Mémoires*, tit. 6, *Absents*, p. 43; 3 Pand. Franç.,

Digitized by Google

pp. 46-7; Bretonnier, vo. *Absents*, p. 13; Lahaye, p. 41, sur l'art. 129; 1 Nouv. Denizart, vo. *Absence*, p. 55; 10 Nouv. Dénizart, vo. *Absence*, p. 70; Arrêt du 2 janvier 1634, J. A.; 1 Guyot, Rép., vo. *Absent*, p. 68; 2 Demolombe, p. 71; C. N., 129. [I. 277 & 279.]

99. Notwithstanding the presumptions mentioned in the preceding article, the succession of the absentee devolves from the day on which he is proved to have died, to the heirs entitled at such time to his estate; and those who have been in the enjoyment of the absentee's property are bound to restore it.—Dard. p. 31; C. N. 130; C. L., 72. [I. 279.]

100. If the absentee reappear, or if his existence be proved during the provisional possession, the judgment granting it, ceases to have effect.—C. N., 131; C. L., 73. [I. 279.]

101. If the absentee reappear, or if his existence be proved, even after the expiration of the hundred years of life or of the thirty years of absence, as mentioned in article 98, he recovers his property in the condition in which it then is, and the price of what has been sold, or the property arising from the investment of such price.—3 Pand. Franç., 45-6; Biret, *Absence*, 245; 2 Demolombe, 283-9; Merlin, Quest., vo. *Héritier*, pp. 325, 328, 330-2; 9 N. Deniz., vo. *Héritier*, § 2, n. 16, p. 600. [I. 279.]

102. The children and direct descendants of the absentee may likewise, within the thirty years from the time at which the said possession becomes absolute, claim the restitution of his property, as mentioned in the preceding article.—C. N. 133.; Pand. Franç., *loc. cit.*; C. L, 75. [I. 279.]

103. After the judgment authorizing provisional possession, persons having claims against the absentee can only enforce them against those who have been authorized to take possession.—1 Arrêtés de Lamoignon, tit. 6, art. 6, p. 38; Bretonnier, *Absents*, p. 15; Mémoires de Lamoignon, p. 44; C. L., 76; C. N., 104. [I. 279.]

Digitized by Google

CHAPTER THIRD.

OF THE EFFECT OF ABSENCE IN RELATION TO CONTINGENT RIGHTS WHICH MAY ACCRUE TO THE ABSENTEE.

104. Whoever claims a right accruing to an absentee must prove that such absentee was living at the time the right accrued; in default of such proof his demand is not admitted.—Pothier, *Successions*, pp. 8, 9, c. 1, sec. 2, art. 1 ; 1 Nouv. Deniz. vo. *Absence*, § 11, p. 57 ; Biret, *Absence*, pp. 157 et seq.; Pothier, *Intr. à Cout. d'Orl.*, tit. 17, n. 6, 7 ; 2 Demolombe, pp. 4, 5 ; 1 Guyot, Rép. vo. *Absent*, 66 ; Lahaye, 43, sur art. 135 ; 10 Nouv, Deniz., *Absence*, 70 ; Bretonnier, *Quest.*, *Absents*, 9, 10 ; Arrêt du 2 janv., 1634 ; C. N., 135. [I. 279 & 281.]

105. If an absentee be called to a succession, it devolves exclusively to those who would have shared with him, or to those who would have succeeded in his stead.—10 Nouv. Deniz. vo. *Absent*, p. 70 ; 1 Toullier, n. 473 à 475, 400, 481 ; 4 *Id.*, pp. 306, 316 ; 7 *Id.*, p. 34 ; 10 *Id.*, p. 7 ; 2 Du Parc Poullain, p. 46, n. 7, 8 ; 3 Pand. Franç., p. 59 ; Biret, 287-9 ; C. N., 136. [I. 281.]

106. The provisions of the two preceding articles do not affect actions for the recovery of inheritances and of other rights, which actions belong to the absentee, his heirs and legal representatives, and are only extinguished by the lapse of time required for prescription.—3 Pand Franç., 60 ; C. N., 107. [I. 281.]

107. So long as the absentee does not reappear, or actions are not brought on his behalf, those to whom the succession has devolved make the profits received by them in good faith their own.—1 Merlin, Rép., *Absent*, sur art. 138, p. 94 ; Pothier, *Propriété*, n. 395-6 . 1 Delvincourt, n. 4, p. 50 ; C. N., 138. [I. 281.]

CHAPTER FOURTH.

OF THE EFFECTS OF ABSENCE IN RELATION TO MARRIAGE.

108. The presumptions of death arising from absence, whatever be its duration, do not apply in the case of marriage ; the husband or

Digitized by Google

wife of the absentee cannot marry again without producing positive proof of the death of such absentee.—Biret, *Absence*, pp. 30, 216–232 ; 2 Demolombe, nos. 7, 260 ; DeMoly, *Absence*, n. 511 ; 1 Zachariæ, pp. 315, 202 ; D'Aguesseau, 28 *Plaidoyer ;* Rolland de Villargues, *Absent*, nos. 343-4 ; 1 Merlin, Rép., *Absence*, p. 96 ; 3 Pand. Franç., p. 61 ; 2 Lamoignon, *Mémoires*, p, 42 ; 1 *Id.*, Arrêtés, p. 38 ; 10 Nouv. Denizart, p. 71 ; Bretonnier, *Quest. de Droit, Absent*, c. 1, p. 3 ; Pothier, Mariage, n. 106 ; Encyclop. de Droit, *Absent*, p. 45 ; 1 Guyot, Rép., *Absent*, p. 67. [I. 281.]

109. If there be community of property between the consorts, such community is provisionally dissolved, from the day of the demand to that effect by the presumptive heirs, after the time required for obtaining authority to take possession of the absentee's property, or from the date of the action that the consort who is present brings against them, for the same purpose ; and in these cases, the liquidation and partition of the property of the community may be proceeded with on the demand of such consort, or of the persons authorized to take provisional possession, or of any other parties interested.—Pothier, *Communauté*, n. 505 ; 1 Guyot, Rép., vo. Absent, p. 69 ; 1 Chardon, p. 220, Des 3 Puissances. [I. 281 to 283.]

110. In the cases provided for in the preceding article, the covenants and rights of the consorts, dependent on the dissolution of the community, become effective and absolute.—1 Lamoignon, *Arrêtés*, p. 37 ; 2 Id. *Mémoires*, p. 42. [I. 283.]

111. If the husband be the absentee, the wife may obtain possession of all the matrimonial profits and advantages resulting from the law or from her marriage contract ; but on condition of giving good and sufficient security to account for and restore all that she shall have so received, should the absentee return.—2 Lamoignon, *Mémoires*, p. 42 ; 1 Encyclop. de Droit, *Absents*, p. 49 ; Bretonnier, *Quest. de Droit*, p. 4. [I. 283.]

112. If the absent consort have no relations entitled to his succession, the consort who is present may obtain provisional possession of the property.—Pothier, *Intr. Cout, d'Orl.*, tit. 17, no 35 ; *ff* Lib., 38, L, unic. *undè vir et uxor* ; 1 Toullier, p. 411 ; 1 Delvincourt, p. 48 ; 3 Pand. Franç., 64 ; Lahaie, p. 45 ; C. N., 140. [I. 283.]

Digitized by Google

CHAPTER FIFTH.

OF THE CARE OF MINOR CHILDREN OF A FATHER WHO HAS DISAPPEARED.

113. If a father have disappeared, leaving minor children issue of his marriage, the mother has the care of such children and exercises all the rights of her husband as to their person and as to the administration of their property, until a tutor is appointed.—*Cod. argumentum ex lege I, ubi pupilli educari* ; 3 Pand. Franç., sur art. 141, p. 65 ; 1 Toullier, p. 389 ; 1 Duranton, p. 438 ; C. N., 141. [I. 283.]

114. After the disappearance of the father, if the mother be dead or unable to administer the property, a provisional or a permanent tutor may be appointed to the minor children.—Bretonnier, *Absents*, c. 2, p. 6 ; 1 Guyot, Rép., vo. *Absent*, p. 68 ; 3 Pand. Franç., 65 ; C. N., 142. [I. 283.]

TITLE FIFTH.

OF MARRIAGE.

CHAPTER FIRST.

OF THE QUALITIES AND CONDITIONS NECESSARY FOR CONTRACTING MARRIAGE.

115. A man cannot contract marriage before the full age of fourteen years, nor a woman before the full age of twelve years.—Pothier, *Mariage*, no. 94 ; Institutes, *nuptiis* ; 3 Pand. Franç., p. 139 ; Dard, sur art. 144 ; C. N., 144. [I. 285.]

Digitized by Google

116. There is no marriage when there is no consent.—Pothier *Mariage*, nn. 92, 93, 227, 307 ; 3 Pand. Franç., pp. 141 et seq. ; C. N., 146. [I. 285.]

117. Impotency, natural or accidental, existing at the time of the marriage, renders it null ; but only if such impotency be apparent and manifest.

This nullity cannot be invoked by any one but the party who has contracted with the impotent person, nor at any time after three years from the marriage.—Pothier, *Mariage*, 96, 445, 458 ; Merlin Rép., vo. *Congrès*, no. 3 ; vo. *Impuissance*, no. 2 ; 3 Demolombe, no. 12 ; 5 Locré, *Lég. civile*, p. 85 ; 6 do., p. 35 ; 2 Toullier, no. 805 ; 3 Pand. Franç., 275 ; 2 Duranton, nos. 67, 71 ; Anc. Deniz., vo. *Impuissance*, nos. 32, 36 ; C. N., 180, 313. [I. 285.]

DECISIONS :—1. Dans une action en nullité de mariage entre deux catholiques, fondée sur un empêchement d'impuissance, le tribunal civil ne peut pas prononcer la nullité du mariage avant qu'un décret de l'autorité ecclésiastique ait préalablement déclaré nul le sacrement.

Le terme de trois ans fixé par les lois à l'action en nullité de mariage pour cause d'impuissance n'est pas absolu.—Q. B.—*Lussier & Archambault*, 2 L. C. J., p. 53.

2. Si la preuve de l'impuissance est incomplète, l'épouse poursuivie devra se soumettre à l'examen de médecins experts, et qu'à son refus de le faire, les causes invoquées dans l'action seront considérées *pro confessis* et le mariage cassé.—Q. B.—*Dorion & Laurent*, 17 L. C. J., p. 324.

3. Un mariage peut être déclaré nul, dix-sept ans après sa célébration, à cause d'impuissance existant lors du mariage, si les parties se sont séparées après sa célébration et ont depuis vécu séparément, et aussi lorsque la partie défenderesse a résidé, depuis cette séparation, en pays étranger. L'autorité ecclésiastique doit d'abord prononcer la nullité du mariage.—Berthelot, J., *Langevin vs. Barette*, 4 R. L., p. 160.

118. A second marriage cannot be contracted before the dissolution of the first.—Pothier, *Mariage*, nos. 103, 105 ; 3 Pand. Franç., p. 154 ; Lahaie, p. 47 ; C. N., 147. [I. 285.]

DECISIONS :—1. Le mariage qui est annulable en loi, est valable tant que les tribunaux ne l'ont pas déclaré nul.

Aucun des conjoints ne peut contracter un second mariage, avant la dissolution du premier.—Torrance, J.—*Burn vs. Fontaine*, 17 L. C. J., p. 40.

2. L'absence prolongée de l'un des époux n'est pas une excuse pour n'avoir pas fait prononcer la nullité du mariage.

Un mariage susceptible d'être annulé et dont la nullité est demandée opère l'émancipation du mineur qui l'a contracté ; et c'est un curateur et non un tuteur qu'il faut nommer à ce mineur émancipé.

L'acquittement d'un mari accusé de bigamie par une cour criminelle, n'emporte aucune présomption de nullité de l'un des mariages,—attendu que la péna-

Digitized by Google

lité décrétée contre la bigamie est prescrite par sept années d'absence ou de séparation des époux et que l'acquittement de l'accusé peut avoir été causé par cette prescription.—TORRANCE, J.—*Burn vs. Fontaine*, 4 R. L., p. 163.

3. Que la nullité d'un second mariage, contractée avant la dissolution d'un premier, n'est pas littéralement absolue. (See C. C. 163.)—CASAULT, J.—*Morin vs. Corporation des Pilotes*, 8 Q. L. R., p. 222.

119. Children who have not reached the age of twenty-one years must obtain the consent of their father and mother before contracting marriage; in case of disagreement, the consent of the father suffices.—Pothier, *Mariage*, nos. 324-328; Pothier, *Des Personnes*, 1 part., tit. 6, sec. 2; 3 Pand. Franç., p. 165; Déclaration de 1639; D'Aguesseau, 30e Plaid.; C. N., 148. [I. 285.]

DECISIONS:—1. A person who celebrates the marriage of a minor, without the consent of her parents, is liable in damages to the parents whose authority has thus been disdained, and such action is maintainable without a previous suit to set aside the marriage—Q. B.—*Larocque & Michon*, 8 L. C. R., p. 222.

2. A protestant minister is liable in damages for celebrating a marriage of a minor daughter of the Plaintiff without the Plaintiff's knowledge and consent, and this notwithstanding he acted by the marriage license usually issued in such cases.—BADGLEY, J.—*Mignault vs. Bonar*, 16 L. C. R., p. 195.

3. Il y a lieu à la cassation et nullité d'un mariage abusivement contracté et célébré par suite du défaut de consentement du père de la fille mineure, du défaut de publications de bans, du dol, fraude, artifices, et menaces du défendeur envers cette fille mineure et l'empêchement dirimant existant entre les parties. —BADGLEY, J.—*Mignault vs. Hapeman*, 10 L. C. J., p. 137.

4. Dans une action pour l'annulation du mariage d'un mineur, le père seul ne peut pas porter l'action, sans que le mineur marié ne soit en cause, assisté conformément à la loi.—MACKAY, J.—*Burn vs Fontaine*, 3 R. L., p. 516.

5. A Protestant minister married a boy of 16 to a widow of 49 upon the production of an ordinary marriage license, the boy having, in reply to the minister's questions, stated that he was 22 years of age. It was held that the minister should not have been satisfied with the boy's assurance as to his age, when the apparent difference between the ages of the contracting parties was such as to arouse suspicion and he was condemned to pay $100 damages. The marriage had been previously annulled by an action at law.—MONK, J.—*Perry vs. Taylor*, 4 L. C. L. J., p. 58.

120. If one of them be dead or unable to express his will, the consent of the other suffices.— Cod. L. 25, *de nuptiis*; 3 Pand. Franc., 164, 178; C. N., 149. [I. 285.]

121. A natural child who has not reached the age of twenty-one years must be authorized, before contracting marriage, by a tutor *ad hoc* duly appointed for the purpose. — Cod. *loc. cit.*; Pothier, *Mariage*, 342. [I. 285]

Digitized by Google

122. If there be neither father nor mother, or if both be unable to express their will, minor children, before contracting marriage, must obtain the consent of their tutor, or, in cases of emancipation, their curator, who is bound, before giving such consent, to take the advice of a family council, duly called to deliberate on the subject.—*ff* L. 20, *de ritu nupt.*; Cod. L., 8, *de nuptiis*; 3 Pand. Franç., 189; Pothier, *Mariage*, nos. 321, 333, 334, 336; Lahaie, p. 52; Ord. de Blois, art. 43; Décl. de 1721, art. 5; Décl. de 1743, art. 12; Edits et Ord. Royaux; C. N., 160. [I. 285.]

123. Respectful requisitions to the father and mother are no longer necessary. [I. 285.]

124. In the direct line, marriage is prohibited between ascendants and descendants and between persons connected by alliance, whether they are legitimate or natural.—Instit., liv. 1, tit. 10; *ff. lib.*, L. 53, 54, *de ritu nupt.*; Pothier, *Mariage*, nos. 132, 148, *in fine*, 153; 3 Pand. Franç., pp. 197, 198, 295 et seq.; 1 Merlin, Vo. *Affinité*, 1; C. N., 161. [I. 285.]

125. In the collateral line, marriage is prohibited between brother and sister, legitimate or natural, and betwen those connected in the same degree by alliance, whether they are legitimate or natural.—*ff.* L., 14, L. 39, *De ritu. nupt.*; Cod. L. 5, *de incest. nupt.*; Pothier, *Mariage*, nos. 133, 154, 158, 160; 1 Toullier, n. 537; C. N., 162. [I. 285.]

Amendment: — *Quœre.* How far does the following Act affect this article.

1. All laws prohibiting marriage between a man and the sister of his deceased wife are hereby repealed, both as to past and future marriages, and as regards past marriages, as if such laws had never existed.

2. This Act shall not affect, in any manner, any case decided by or pending before any Court of Justice, nor shall it affect any rights actually acquired by the issue of the first marriage previous to the passing of this act; nor shall this act affect any such marriage when neither of the parties has afterwards, during the life of the other, lawfully intermarried with any other person.—D. 45 Vict., cap. 42; (Acts of the Provinces and of Canada not repealed by the Revised Statutes, *alias* R. S. C. Vol. 3, p. 1025.)

DECISION:—Que jusqu'à la mise en force du Code Civil, la parenté au second degré de consanguinité en ligne collatérale a toujours, pour les catholiques

Digitized by Google

de cette province, été reconnue comme un empêchement dirimant de mariage, dont les parties, pour contracter validement mariage, devaient obtenir dispense de l'autorité ecclésiastique.—BOURGEOIS, J.—*Globensky & Wilson*, M. L. R., 2 S. C., p. 174.

126. Marriage is also prohibited between uncle and niece, aunt and nephew.—*ff loc. cit. Inst., De nuptiis*, L., 39 ; 10 Merlin, vo *Empêchement*, § 4 ; Pothier, *Mariage*, nos. 133, 146, 148, 154, 161 ; C. N., 163. [I. 285.]

127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities.

The right, likewise, of granting dispensations from such impediments appertains, as heretofore, to those who have hitherto enjoyed it.—2 Steph., 240, 284. [I. 287.]

DECISIONS :—1. Dans une action en nullité de mariage entre deux catholiques, fondée sur un empêchement dirimant, le tribunal civil ne peut prononcer la nullité du mariage qu'après que le lien religieux ou sacramentel a été déclaré nul par l'autorité ecclésiastique.—POLETTE J.—*Vaillancourt vs. Lafontaine*, 2 L. C. J.. p. 305.

2. L'autorité ecclésiastique doit d'abord prononcer la nullité du mariage.—BERTHELOT, J.—*Langevin vs. Barette*, 4 R. L., p. 160.

See also cases noted at C. C., 128 and 129.

CHAPTER SECOND.

OF THE FORMALITIES RELATING TO THE SOLEMNIZATION OF MARRIAGE.

128. Marriage must be solemnized openly, by a competent officer recognized by law ; C. N., 165. [I. 287.]

Amendment :—See Imperial Act, 42-43 Vict., c. 29, respecting marriages on board Her Majesty's ships.

DECISION :—Que le seul fonctionnaire compétent à célébrer le mariage de deux catholiques est le propre curé des parties ; que la licence accordée par le représentant du Gouvernement Civil n'est d'aucune valeur pour dispenser des publications de bans requises pour les catholiques, et qu'en conséquence, le mariage célébré dans l'espèce par un ministre protestant, et en vertu d'une simple licence, est un mariage nul et abusivement contracté.

Qu'avant de prononcer sur la validité de tel mariage, la Cour Supérieure doit référer la cause à l'ordinaire du diocèse, pour qu'il prononce préalablement la nullité du mariage et sa dissolution, s'il y a lieu, sauf à adjuger ensuite par la

Digitized by Google

Cour Supérieure, quant aux effets civils du mariage.—JETTÉ, J.—*Laramée vs. Evans*, 25 L. C. J., p. 261, 3 L. N., p. 342, 5 L. N., p. 51, 3 Thémis, p. 206.

129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status, are competent to solemnize mariage.

But none of the officers thus authorized, can be compelled to solemnize a mariage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the church to which he belongs.—Pothier, *Mariage*, 346, 349, 354-360 ; Russell, *On Crimes*, pp. 192 et seq. ; 35 Geo. III, c. 4, s. 1 ; C. S. L. C., c. 20, ss. 16, 17. [I. 287.]

Amendment :— No minister who has performed any marriage ceremony, under the authority of a license issued under this act, shall be subject to any action or liability, for damages or otherwise, by reason of there being any legal impediment to the marriage, unless at the time when he performed such ceremony, he was aware of the existence of such impediment.—Q. 35 Vict., cap. 3, s. 6.

DECISIONS :—1. Un mariage contracté devant un autre prêtre que le propre curé est nul.—POLETTE, J.,—*Vaillancourt vs. Lafontaine*, 2 L. C. J., p. 305.

2. Le mariage de deux catholiques romains, autorisé par une licence et célébré par un ministre protestant, est légal, et un tel mariage n'a pas besoin d'être précédé de publications ; d'ailleurs, un tel mariage, s'il est susceptible d'être annulé pour aucune des causes reconnues par la loi, est valable jusqu'à ce qu'il soit annulé par une cour de justice, et ceux qui l'ont contracté ne peuvent passer à un second mariage, tant que le premier n'a pas été annulé.—TORRANCE, J., *Burn vs. Fontaine*, 5 R. L., p. 163. See also cases noted at C. C., 119.

130. The publications of bans, required by articles 57 and 58, are made by the priest, minister or other officer, in the church to which the parties belong, at morning service, or if there be no morning service, at evening service, on three Sundays or holidays with reasonable intervals. If the parties belong to different churches, these publications take place in each of such churches.—On necessity of publication : Pothier, *Mariage*, 72-3-4-5, 356 ; Ord. de Blois, art. 40 ; Merlin, Rép., vo. *Mariage*, § 4 ; Wharton, L. L., vo. *Bans ;* 1 Russell, *On Crimes*, 189 et seq. :—By whom : 4 Geo. IV, c. 76, ss. 6, 7 ; 1 Russell, p. 193 :—Where : Pothier, *Mariage*, 72 ; 2 Pand. Franç., p. 321 ; 4 Geo. IV, c. 76, s. 2 ; Lewis, *On Marriage*, 82 ; 2 Russell, p. 190 :—Number of publications and when ; Pothier, 74-5-7 ; 4 Geo. IV, *loc. cit. ;* 2 Pand. Franç., 322-4 ; 1 Russell, *loc. cit.* [I. 287.]

131. If the actual domicile of the parties to be married has not

Digitized by Google

been established by a residence of six months at least, the publications must also be made at the place at the place of their last domicile in Lower Canada.—Guyot, Rép., vo. *Bans de Mariage*, p. 175. [I. 287.]

132. [If their last domicile be out of Lower Canada, and the publications have not been made there, the officer who, in that case, solemnizes the marriage, is bound to ascertain that there is no legal impediment between the parties.]—[I. 287.]

DECISION :—The question as to the value, as legal evidence, of the statement in the marriage certificate, of the domicile of the parties, is discussed in the case of.—Q. B.—*Wadsworth & McCord*, M. L. R., 2 Q. B., p. 113; 11 Q. L. R., p. 232.—Supreme Court, 12 S. C. R., p. 466.

133. If the parties or either of them be, in so far as regards marriage, under the authority of others, the bans must be also published at the place of domicile of those under whose power such parties are.—Pothier, 72, 357 ; C. N., 168. [I. 287.]

134. The authorities who have hitherto held the right to grant licenses or dispensations for marriage, may exempt from such publications.—Pothier, 77, 78 ; Ord. de Blois, art. 40 ; 2 Pand. Franç., 324 ; 4 Geo. IV, c. 76 ; 35 Geo. III, c. 4, s. 4 ; C. N., 169. [I. 289.]

135. A marriage solemnized out of Lower Canada between two persons, either or both of whom are subject to its laws, is valid, if solemnized according to the formalities of the place where it is performed, provided that the parties did not go there with the intention of evading the law.—2 Merlin, Rép., vo. *Bans*, pp. 436-37 ; 1 Toullier n. 576 ; 1 Vazeille, p. 314 ; Rolland de Villargues, *Mariage*, n. 22 ; 3 Favard, Rép., p. 30 ; Pothier, *Mariage*, 327, 363 ; 1 Bouhier, 390. [I. 289.]

DECISIONS.—1. Un mariage célébré aux Etats-Unis entre deux personnes ayant leur domicile dans le Bas-Canada, et dont l'une (la femme) était mineure et n'avait pas le consentement de son tuteur, est valable, et emporte communauté de biens.

Un contrat de mariage subséquent, fait dans le Bas-Canada, du consentement, et en la présence du tuteur, stipulant pour sa mineure séparation de biens, et suivi d'une célébration en face de l'Eglise, ne peut avoir d'effet ; et cette nullité peut être invoquée par le tuteur lui-même sur une action en reddition de compte portée contre lui par sa mineure comme séparée de biens d'avec son mari, ce dernier étant débiteur personnel du dit tuteur.—Q. B.—*Languedoc & Laviolette*, 8 L. C. R., p. 257.

2. A marriage contracted where there are no priests, no magistrates, no civil or religious authority and no registers, may be proved by oral evidence, and the

Digitized by Google

admission of the parties, combined with long cohabitation, and repute will be the best evidence. An Indian marriage, according to the usage of the Cree country in the North West Territories of Canada, followed by cohabitation and repute and the bringing up of a numerous family, is a valid marriage.—MONK, J., *Connolly vs Woolrich*, 11 L. C. J., p. 197.

See also cases noted at C. C. 51.

CHAPTER THIRD.

OF OPPOSITIONS TO MARRIAGE.

136. The solemnizing of a marriage may be opposed by any person already married to one of the parties intending to contract.—Pothier, no. 81 ; 3 Pand. Franç., p. 241 ; C. N., 172. [I. 289.]

137. The marriage of a minor may be opposed by his father or, in default of the latter, by his mother.—Pothier, *Mariage*, 81 ; Merlin, vo. *Opposition à Mariage*, sur art. 173 ; 1 Toullier, p. 489 ; C. N., 173. [I. 289.]

138. In default of both father and mother, the tutor or, in cases of emancipation, the curator may also oppose the marriage of such minor ; but the court to which such opposition is submitted, cannot decide on its merits without the advice of a family council, which it must order to be called.—Pothier, *Mariage*, 81 ; Merlin, vo. *Opposition à Mariage*, sur art. 172 ; 1 Toullier, p. 425, 490 ; 3 Pand. Franç., 248 ; 2 Favard, *Mariage*, sec. 2, § 1, no 3, p. 59 ; 1 Delv., p. 62 ; C. N., 175. [I. 289.]

139. If there be neither father nor mother, tutor nor curator, or if the tutor or curator have consented to the marriage without taking the advice of a family council, the grandfathers and grandmothers, the uncles and aunts, and the cousins-german, who are full age, may oppose the marriage of their minor relative ; but only in the two following cases :

1. When a family council, which, according to article 122, should have been consulted, has not been so ;

2. When the party to be married is insane.—Authorities under preceding article ; 2 Toullier, p. 446-7 ; Pothier, *Mariage*, no. 81 ; C. N., 174. [I. 289.]

Digitized by Google

140. When opposition is made under the circumstances and by any of the persons mentioned in the preceding article, if the minor have neither tutor nor curator, the opposant is bound to cause one to be appointed ; if the minor have already a tutor or curator, who has consented to the marriage without consulting a family council, the opposant must cause a tutor *ad hoc* to be appointed ; in order that such tutor, curator, or tutor *ad hoc* may represent the interests of the minor in such opposition.—[I. 289.]

141. [If a person about to be married, being of the age of majority, be insane, and not interdicted, the following persons may oppose the marriage, in the following order :

1. The father, and in his default, the mother ;
2. In default of both father and mother, the grandfathers and grandmothers ;
3. In default of the latter, the brothers or sisters, uncles or aunts or cousins-german, of the age of majority ;
4. In default of all the above, those related or allied to such person who are qualified to take part in the meeting of a family council, which should be consulted as to the interdiction.]—3 Pand. Franç., 246-7. [I. 289 to 291.]

142. When the opposition is founded on the insanity of the person about to be married, the opposant is bound to apply for the interdiction and to have it pronounced without delay.—3 Pand. Franç., 247 ; Pothier, *Mariage*, No. 81 ; Rép. Merlin, vo. *Opposition au Mariage*, pp. 88 et seq., & No. 4 sur art. 174.—C. N., 174. [I. 291.]

143. [Whatever may be the quality of the opposant, it is his duty to adopt and follow up the formalities and proceedings necessary to have his opposition brought before the court and decided within the legal delays, a demand for its dismissal not being required ; in default of his so doing, the opposition is regarded as never having been made, and the marriage ceremony is proceeded with, notwithstanding.]—3 Pand. Franç., 254. [I. 291.]

144. The Code of Civil Procedure contains the rules as to the form, contents and notification of oppositions to marriage, as well as those relative to the peremption mentioned in the preceding article, and to the other proceedings required.—C. C., P. 990 et seq. [I. 291.]

Digitized by Google

145. The oppositions are brought before the court of original jurisdiction of the domicile of the party whose marriage is opposed, or of the place where the marriage is to be solemnized, or before a judge of such court.—3 Pand. Franc., 253. [I. 291.

146. Proceedings upon appeals from such judgments are summary and take precedence.—3 Pand. Franc. 253-4. [I. 291.]

147. If the opposition be rejected, the opposants, other than the father and mother, may be condemned to pay costs, and are liable for damages according to circumstances.—3 Pand. Franc., 255-6; C. N., 179. [I. 291.]

CHAPTER FOURTH.

OF ACTIONS FOR ANNULLING MARRIAGE.

148. A marriage contracted without the free consent of both parties, or of one of them, can only be attacked by such parties themselves, or by the one whose consent was not free.

When there is error as to the person, the marriage can only be attacked by the party led into error.—Pothier, *Mariage*, 444, 308; 3 Pand. Franc., 146-7; Merlin, Rép., *Mariage*, s. 1, § 2 s. 6, § 2; C. N., 180. [I. 291.]

DECISIONS:—1. A person attacked with *delirium tremens* may have a lucid interval and may contract a valid marriage during such lucid interval.

It will not be reputed *in extremis* although death ensues within two days after its celebration, if the person was not at the time sensible that he was attacked with his last illness, and in imminent danger of dying.

The testimony of the attending physician to the incapacity of the person, corroborated by the consulting physician called in the day after the marriage and the day preceding the decease, may be refuted by the testimony of the notary, the priest and a witness present at the celebration of the marriage and the execution of the marriage contract.

When the status of the wife is recognized, collateral relations have not the quality to dispute the marriage.

Acknowledgment of the status of the children precludes an interested party from afterwards disputing the marriage.

The status of a family being indivisible, it cannot be recognized by certain members, and disputed by other members of the same family.

The Ordonnance of 1639 depriving of civil effects marriages *in extremis* should be strictly interpreted.—Q. B.—*Scott & Paquet*, 4 L. C. J., p. 149.

2. In an action by the husband in nullity of marriage, the wife's attorneys,

Digitized by Google

upon proof of her poverty and of the husband's means, are entitled to receive from the husband a sufficient sum to provide for the wife's costs of action.—MATHIEU, J.—*Tombyll vs. O'Neill*, 11 L. N., p. 305.

149. [In the cases of the preceding article, the party who has continued cohabitation during six months after having acquired full liberty or become aware of the error, cannot seek the nullity of the marriage.]—C. N., 181. [I. 291.]

150. A marriage contracted without the consent of the father or mother, tutor or curator, or without the advice of a family council, in cases where such consent or advice was necessary, can only be attacked by those whose consent or advice was required.—Pothier, *eod. loc.* & 447; C. N., 182. [I. 291 to 293.]

DECISION:—Dans une action pour l'annulation du mariage d'un mineur, le père seul ne peut pas porter l'action, sans que le mineur marié ne soit en cause, assisté conformément à la loi.—MCKAY, J.—*Burn vs. Fontaine*, 3 R. L., p. 516.

151. [In the cases of articles 148 and 150, an action for annulling marriage cannot be brought by the husband or wife, tutor or curator, or by the relations whose consent is required, if the marriage have been either expressly or tacitly approved by those whose consent was necessary; nor if six months have been allowed to elapse without complaint on their part since they became aware that the marriage had taken place.]—Pothier, *Mariage*, n. 446; *Id.*, *Des Personnes*, 1 part, tit. 6, s. 2; 3 Pand. Franç., 265-268; C. N., 183. [I. 293.]

152. Any marriage contracted in contravention of articles 124, 125 and 126, may be contested either by the parties themselves, or by any of those having an interest therein.—Pothier, 444, 449, 451; 3 Pand. Franç., 271 à 275; C. N., 184. [I. 293.]

153. But a marriage contracted before the parties or either of them have attained the age required, can no longer be contested:

1. When six months have elapsed since the party or parties have attained the proper age;

2. When the wife, under that age, has conceived before the termination of the six months.—Pothier, 94, 95; Pand. Franç., 275, 281; C. N., 185. [I. 293.]

154. The father, mother, tutor or curator, or the relations who have consented to the marriage, in the cases mentioned in the

Digitized by Google

preceding article, are not allowed to seek the nullity of such marriage. —Pothier, 446 ; 3 Pand. Franç., 282-3 ; C. N., 186. [I. 293.]

155. In the cases referred to in article 152, where the action for annulling the marriage belongs to all those interested, the interest must be existing and actual, to permit the exercise of the right of action by the grandparents, collateral relatives, children born of another marriage, and third persons.—Pothier, *Mariage*, no. 1 ; Merlin, Quest., vo. *Mariage*, t. 10, § 5, p. 19 ; Merlin, Répert., vo. *Mariage*, t. 19, p. 483 ; Lahaie sur art. 187 ; Lebrun, *Successions*, liv. 3, c. 6 ; Pand. franç., p. 283 et seq. ; C. N,, 187. [I. 293.]

156. Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the court to decide according to the circumstances. —Pothier, *Mariage*, nos. 361, 362, 451 ; C. N., 191. [I. 293.]

157. [If the publications required were not made, or their omission supplied by means of a dispensation or license, or if the legal or usual intervals for the publications or the solemnization have not elapsed. the officer solemnizing the marriage under such circumstances, is liable to a penalty not exceeding five hundred dollars]—C. N., 192. [I. 293.]

158. [The penalty imposed by the preceding article is in like manner incurred by any officer who, in the execution of the duty imposed upon him, or which he has undertaken, as to the solemnization of a marriage, contravenes the rules prescribed in that respect by the different articles of the present title]—C. N., 193 ; Pothier, *Mariage*, 364. [I. 293.]

159. No one can claim the title of husband or wife and the civil effects of marriage, unless he produces a certificate of the marriage, as inscribed in the registers of civil status, except in the cases provided for by article 51.—Pothier, *Mariage*, 378, Ord. 1667, tit. 20, art. 7 ; C. N. 194. [I. 295.]

160. Possession of the status does not dispense those who pretend to be husband and wife, from producing the certificate of their marriage.—Pothier 374-378 ; Ord. 1667, tit. 20, art. 8 ; Décl. de 1736 ; 3 Pand. Franç., 319 ; C. N., 145. [I. 295.]

Digitized by Google

161. When the parties are in possession of the status, and the certificate of their marriage is produced, they cannot demand the nullity of such act.—3 Pand. Franç., 322; C. N., 196. [I.295.]

162. Nevertheless, in the case of articles 159 and 160, if there be children issue of two persons who lived publicly as husband and wife, and who are both dead, the legitimacy of such children cannot be contested solely on the pretext that no certificate is produced, whenever such legitimacy is supported by possession of the status uncontradicted by the act of birth.—Cod. L. 9, *De nuptiis*; *ff*, L. 14, *De probat*; Cochin, Plaidoyer Bourjelas; 3 Pand. Franç., 325-337; Merlin, Rép., vo. *Légitimité*, s. 1, § 2, p. 28; 1 Toullier, pp. 320, 498; 2 do, p. 151; Delvincourt, p. 173; C. N., 197. [I. 295.]

DECISION:—Qu'en vertu des dispositions de l'article 162 C. C., lorsque l'acte de célébration du mariage des père et mère n'est pas produite, et qu'il existe des enfants issus d'eux et qu'ils ont vécu publiquement comme mari et femme, et qu'ils sont tous deux décédés, la légitimité des enfants ne peut être contestée sous le seul prétexte du défaut de représentation de l'acte de célébration, toutes les fois que cette légitimitée est appuyée sur une possession d'état qu'il n'est pas contredite par l'acte de naissance.—Q. B.—*La Cie. de Prêt et de Dépôt du Canada & Chevalier*, 16 R. L., p. 222.

163. A marriage although declared null, produces civil effects, as well with regard to the husband and wife as with regard to the children, if contracted in good faith.—Pothier, *Mariage*, 104, 437, 438, 419, 441; *Successions*, c. 1, s. 2, art. 3 § 4; *Intr. au Traité de la Communauté*, n. 17; *Cout. d'Orl.*, tit. 17, n. 13; Merlin, Rép., vo. *Légitimité*, s. 1, § 1, n. 8; C. N., 201. [I. 295.]

DECISION:— A woman in good faith and after nine years absence on the part of her husband re-married. Subsequently her first husband returns. She then ceases to live with her second husband and procures a *séparation de corps et de biens* from her first husband. On the death of her second husband, she seeks to recover, in the quality of his widow, a certain widow's pension which the Defendant's Company were liable to pay to the widows of its members.

HELD: That she could not recover. That although her second marriage was never dissolved, yet her assuming the quality of wife, in her action *en séparation de corps et de biens* against her first husband, was such a free and public admission of her quality as such, that it constituted a bar to her assuming the status of widow of her alleged second husband.—CASAULT, J.—*Morin vs. La Corporation des Pilotes*, 8 Q. L. R., p. 222.

164. If good faith exist on the part of one of the parties only, the marriage produces civil effects in favor of such party alone and in favor of the children issue of the marriage.—Pothier, *Mariage*, 439,

Digitized by Google

440; *Communauté*, 20; *Successions*, c. 1, sec. 2, art. 3, § 4; *Int. Cout. d'Orl.*, tit. 17, n. 13; Dard, p. 45; C. N., 202. [I. 295.

DECISION:—A woman who in good faith contracts a marriage with a married man, believing that the man whom she marries is free and not engaged in the bonds of matrimony, obtains thereby the civil effects of a legal marriage. In such case the legitimate wife, still living in England, is entitled to one third of the sum of money in question in the case. The residue must be divided between the second wife and the children as well of the first wife as of those issue of the alliance. The second wife takes one half of the residue and the other half is divided between all the said children.—TASCHEREAU, J.—*Cathcart vs. Union Building Society*, 15 L. C. R., p. 467.

CHAPTER FIFTH.

OF THE OBLIGATIONS ARISING FROM MARRIAGE.

165. Husband and wife contract, by the mere fact of marriage, the obligation to maintain and bring up their children.—Pothier, *Mariage*, 384, 394; Merlin, Rép., vo. *Aliments*, § 1, art. 1, nos. 3, 5, 6; *ff* 1, 4, 5, *de agnosc. et alendis liberis*; C. N., 203. [I. 295.]

DECISIONS:—1. Le père n'est pas tenu de payer la pension de son fils mineur qui apprend un métier, lorsque les gages de ce dernier sont suffisants pour payer cette pension.—LORANGER, J.—*Veillette vs. Lebœuf*, 6 R. L., p. 25.

2. The mother has an absolute right to the charge of a child, aged 12, (the father being dead), unless it be established that she is disqualified by misconduct or is unable to provide for the child.—RAMSAY, J. *ex-parte—Grace Ham*, 27 L. C. J., p. 127.

3. Que l'enfant naturel, reconnu de ses parents, quand même il serait parvenu à l'âge de pourvoir lui-même à sa subsistance, peut réclamer d'eux des aliments, lorsqu'il est dans un état de dénument actuel, causé soit par infirmité, manque d'ouvrage ou autres raisons du même genre.—Q. B.—*Clément & Francis*, 4 Q. B. R., p. 13.—C. R.,—6 L. N., p. 194. See C. C., 240.

4. Que l'époux n'est pas tenu de fournir des aliments aux enfants que son conjoint a eu d'un précédent mariage. — MATHIEU, J. — *Desjardins vs. Boyer*, 14 R. L., p. 506.

5. Que le père est tenu en loi à l'entretien et l'éducation de son enfant et que ni lui ni ses représentants ne peuvent opposer les dépenses faites pour ces objets, en compensation à une dette légitimement due à l'enfant. (C. C. 720).—TASCHEREAU, J.—*Boileau vs. Seers*, M. L. R., 1 S. C., p. 239.

6. Que le père peut, suivant les circonstances, être condamné à payer à un tiers la pension fournie par ce dernier à ses enfants qui ont laissé le toit paternel en difficulté, et qui y sont retourné ensuite.—MATHIEU, J.—*Cousins vs. Bouchard*, 15 R. L., p. 578.

7. Que le père a le droit d'exiger que les revenus personnels de ses enfants

Digitized by Google

mineurs satisfassent à leurs dépenses d'entretien, de nourriture et d'éducation ; ou, en autres termes, que le père n'est pas obligé d'encourir ces dépenses sur ses biens personnels si ses enfants ont des revenus.—CIMON, J.—*Anctil vs Martin*, 10 L. N., p. 297.

8. A merchant who sells clothes to a minor without an order from his father, can only recover the price from the latter when the former himself had a right to compel his father to provide him therewith; and it devolves upon the merchant to show that the clothes supplied were necessary, and that the former was unable to provide himself therewith.—WURTELE, J.,—*Greenshields vs Duhamel*, 11 L. N., p. 250.

See also cases noted at C. C., 175 and 1423.

166. Children are bound to maintain their father, mother and other ascendants, who are in want.—Pothier, *Oblig.*, 123; *Mariage*, 389, 390, 392, 393, 395; *Personnes*, part. 1, tit. 6, s. 2; *Int. gén. aux Cout.*, n. 117; 1 Marcadé, n. 722; C. N., 205. [I. 295.]

DECISIONS:—1. An indigent parent can maintain an action *in factum* against his or her child for an alimentary allowance.—K. B.—*Parent vs Dubuc*, I. R. de L., p. 504.

2. Les enfants qui sont tenus par la loi de fournir des aliments à leurs parents doivent y être condamnés solidairement. Les parents peuvent s'adresser à celui des enfants qu'ils jugent à propos pour lui demander des aliments.—MONK, J.—*Lauzon vs Connoissant*, 5 L. C. J., p. 99.

3. Les grands-pères et grands-mères doivent des aliments à leurs petits-enfants en bas âge et indigents.—STUART, J.,—*Resche vs Ratté*, 16 L. C. R., p. 413.

4. That the obligation of children to maintain an indigent parent is divisible, and each of the children is bound to contribute in proportion to his or her means.—JOHNSON, J.,—*Leblanc vs Leblanc*, 23 L. C. J., p. 10.

5. Where they are children and grand-children, issue of a deceased child, the grand-children are liable with the children, for the maintenance of the grand-parents, even although the children have the means of supplying the aliments themselves.—TORRANCE, J.,—*Reeve vs Mongeau*, 5 L. N., p. 373.

6. The fact of the father being guilty of gross misconduct does not deprive him of his right to an alimentary allowance from his children.—MACKAY, J.,—*Lafon vs Lafon*, 6 L. N., p. 84.

7. In an action for an alimentary allowance, by the mother against her children, issue of her marriage with her husband, the declaration did not allege that her husband, the father of the Defendants, was unable to support himself and his wife. *Held*:—That a mother, although poor and unable to support herself, has no right to claim an alimentary allowance from her children so long as she does not show that her husband is unable to support them both.—CASAULT, J.—*Bernard vs Bernier*, 9 L. N., p. 182.

8. Que l'obligation de fournir une pension alimentaire est indivisible, et que ceux qui y sont tenus, la doivent conjointement et solidairement; que, par suite, l'un d'eux porusuivi seul a droit d'action contre les autres pour leur faire payer leur quote part. Que cette solidarité ne cesse que lorsque ceux qui sont obligés de payer n'en ont pas les moyens, ce qui est une question de fait et ne peut être invoquée par défense en droit.—MOUSSEAU, J.,—*Valiquette vs Valiquette*, M. L. R., 1 S. C., p. 129, 8 L. N., p. 61.

Digitized by Google

9. That the obligation of children to maintain their father and mother and other ascendants who are in want, does not cease when the necessitous condition of the parent is caused by his own fault. The intemperance of an aged father does not constitute a valid ground for refusing to maintain him.—C. R.,—*Arless vs Arless*, M. L. R., 3 S. C., p. 43.

167. Sons-in-law and daughters-in-law are also obliged, in like circumstances, to maintain their father-in-law and mother-in-law, but the obligation ceases:

1. When the mother-in-law contracts a second marriage;

2. When the consort, through whom the affinity existed, and all the children issue of the marriage, are dead.—3 Pand. Franc., 360; C. N., 206. [I. 295 to 297.]

168. The obligations which result from these provisions are reciprocal.—Pothier, *Mariage*, 385-7; Merlin, *Aliments*, § 11 *bis*, n. 2; 2 Toullier, p. 3: 1 Delvincourt, p. 92; C. N., 207. [I. 297.]

169. Maintenance is only granted in proportion to the wants of the party claiming it and the fortune of the party by whom it is due.—Pothier, *loc. cit. Mariage*, 385, 389, 390; Pand. Franç., pp. 356 to 364; C. N., 208. [I. 297.]

170. Whenever the condition of the party who furnishes or of the party who receives maintenance is so changed that the one can no longer give or the other no longer needs the whole or any part of it, a discharge from or a reduction of such maintenance may be demanded.—3 Pand. Franç., 364; C. N., 209. [I. 297.].

171. If the person who owes a maintenance, justify that he cannot pay an alimentary pension, the court may order such person to receive and maintain in his house the party to whom such maintenance is due.—Pothier, *Mariage*, n. 391; *Des personnes*, 1 part., tit. 6, § 2; Merlin, Rép. vo. *Aliments*, § 1; Lahaie, p. 71; C. N., 210. [I. 297.]

DECISIONS:—1. Lorsque la pension est demandée par ou pour le mari seul, la cour ne peut refuser aux enfants le privilège discrétionnaire de recevoir chez eux leur père, parceque ce dernier est marié en secondes noces.—Q. B.—*Bachand & Bachand*, 28 L. C. J., p. 155, 12 R. L., p. 39.

2. The Court doubted its power to order the father to live with his children, when the father was married to a third wife, and consequently the children were ordered to pay an alimentary allowance.—DOHERTY, J.—*Labranche vs. Labranche*, 6 L. N., p. 60.

Digitized by Google

172. The court likewise decides whether the father or mother, who, although able to pay, offers to receive and maintain the child to whom a maintenance is due, shall in that case be exempted from paying an alimentary pension.—Pothier, *Mariage*, 391, 394, 395; 1 Soefve, cent. III, c. 100; 2 Despeisses, p. 241, No. 67; 3 Pand. Franç., 366, 369; C. N., 211. [I. 297.]

CHAPTER SIXTH.

OF THE RESPECTIVE RIGHTS AND DUTIES OF HUSBAND AND WIFE.

173. Husband and wife mutually owe each other fidelity, succor and assistance.—Pothier, *Mariage*, 380, 382; Merlin, Rép., vo. *Aliments*, § 3, n. 5; 1 Marcadé, p. 548, n. 724; C. N., 212. [I. 297.]

174. A husband owes protection to his wife; a wife obedience to her husband.—Pothier, *Mariage*, 382, 400; *Puissance marit.*, n. 1; 2 Toullier, p. 14; 1 Delvincourt, p. 79; C. N., 213. [I. 297.]

175. A wife is obliged to live with her husband, and to follow him wherever he thinks fit to reside. The husband is obliged to receive her and to supply her with all the necessaries of life, according to his means and condition.—Pothier, *Mariage*, 382; *Puissance marit.*, 1; *Introd. au tit.* 10; *Cout d'Orl.*, n. 143; 3 Pand. Franç. p. 376; C. N., 214. [I. 297.]

DECISIONS:—1. If a husband turns his wife out of doors, she can maintain an action *in factum* against him for alimentary allowance.—K. B.—***Chamland vs Jobin***, 1 R. de L., p. 504.

2. The husband, when legal community exists, is not liable for debts incurred by the wife in the maintenance of a separate establishment from her husband, if she has voluntarily left his domicile without legal cause.—SHORT, J.—***Morkill vs Jackson***, 14 L. C. R., p. 181.

3. Une femme n'a pas d'action contre son mari pour une pension alimentaire, sous prétexte qu'elle n'a pas de comfort dans sa maison. Elle doit résider avec lui.—C. R.—***Conlan vs Clarke***, 3 R. L., p. 448.

4. Un mari qui a fait défense à un marchand de faire aucune avance à son épouse, ou à sa famille, sous peine de perdre le montant de ces avances, doit cependant être condamné à payer le prix d'effets et marchandises vendues et livrées à sa famille, lorsque lui ou sa famille ont retiré quelque avantage de ces effets et marchandises par l'usage et la consommation, et qu'il a connu le fait des avances.—SICOTTE, J.—***Bonnier vs Bonnier***, 3 R. L. p. 35.

5. During the existence of the community between husband and wife, the husband only can be sued for the debts of the community.—SUPERIOR COURT.—(Judge's name not given).—***Frigon vs Côté***, 1 Q. L. R., p. 152.

Digitized by Google

6. If the husband is without means, the creditors may claim from the wife payment of household debts for necessaries supplied after the husband's insolvency.—TORRANCE, J.—*McGibbon vs Morse*, 21 L. C. J., p. 311.

7. When a husband withdraws himself from the matrimonial domicile, and notwithstanding the willingness of his wife to continue to reside there with him, refuses to provide her with a fit and proper residence and with support and maintenance according to his means, the wife may sue the husband for maintenance only, without suing for *séparation de corps et d'habitation.* — Q. B. — *Conlan & Clarke*, 25 L. C. J., p. 90.

8. Although the husband is responsible for the maintenance of his wife, yet if she be removed against his wish from the place where he has made provision for her, he ceases to be liable for disbursements made on her account or for the cost of her maintenance.—RAINVILLE, J.—*Hughes vs Rees*, 5 L. N., p. 70.

9. Que le mari est tenu pour la dette contractée pour les services du médecin rendus à sa femme, même lorsqu'ils sont séparés de biens.—JOHNSON, J.—*D'Orsonnens vs Christin*, 7 L. N., p. 338.

10. Where the husband neither does nor assents to any act to show that he has held out his wife as his agent to pledge his credit for goods supplied on her order, the question whether she bears that character must be examined upon the circumstances of the case. The question is one of fact.—PRIVY COUNCIL.—*Debenham & Millon*, 6 App. Cas., p. 24.

11. Le mari n'est pas responsable pour le prix des marchandises vendues à crédit à son épouse lorsqu'il avait formellement défendu au marchand de ne point faire crédit à aucun membre de sa famille et qu'il est admis que le mari a toujours fourni à sa famille tout ce dont elle a besoin et que sa femme fait des dépenses extravagantes.—DAVIDSON, J.—*Roy vs Granger*, 11 L. N., p. 18.

12. That the obligation of a wife to reside in her husband's home is conditional upon the furnishing by him of one reasonably fit for her residence. An action lies to compel a wife to reside with her husband. *Quære*, whether she can be compelled to do so by *contrainte par corps* or *manu militari*.—ANDREWS, J.—*Sansfaçon vs Poulin*, 13 Q. L. R., p. 53.

See also cases noted at C. C., 165 and 1423.

176. A wife cannot appear in judicial proceedings, without her husband or his authorization, even if she be a public trader or not common as to property; nor can she, when separate as to property, except in matters of simple administration.—*Cout. Paris*, art. 224, 234; Pothier, *Obl.*, 878; *Puis. marit.*, I5, 55, 56, 61, 62; *Cout. d'Orl., intr. au tit.* 10, n. 201; 3 Pand. Franç., 378-387; C. N., 215. [I. 297.]

Amendment :—95. The husband, wife, father, mother, brother, sister, curator, tutor, or employer, of any person who has the habit of drinking intoxicating liquor to excess;

The manager or person in charge of any asylum or hospital, or other charitable institution, in which such person resides or is kept;

The curator of any interdicted person;

Or the father, mother, brother or sister, of the husband or wife of such person;

Digitized by Google

Or the tutor or guardian of any child of such person;

May give notice in writing, signed by him or her, to any person licensed to sell intoxicating liquors, or who habitually sells such liquors, not to sell or deliver the same to the person having such habit.

96. If in the course of one year from the date of such notification, the person thus notified, either personally, or by his clerk, servant or agent, sells or delivers such liquors otherwise than on a special demand, for medicinal purposes, signed by a medical practitioner, to the person having such habit, the person who had given the notice may, by an action for personal damages (if the same be instituted, within six months, from the commission of the offence), recover from the defendant, the sum of ten dollars at least, and of five hundred dollars at most, accordingly as it shall be adjudged by the court or jury, as damages.

97. Every married woman may, notwithstanding the article 176 of the civil code, institute such an action in her own name, without the authorization of her husband. All damages recovered by her are, in such cases, for her sole use.

98. In the case of death of either of the parties to the suit, the action, and the right of action, given by the articles 95, 96, 97 subsist in favor of or against their legal representatives respectively, provided that the identity of the person, to whom the liquor is sold, be known to the seller at the time of such sale or delivery.

106. The amount thereof may be recovered from the receiver thereof by the party who made such payment, or by his wife without the authorization of her husband, and by his father or his tutor if he be a minor; and all contracts and obligations whatever, in whole or in part, made and entered into, for or by reason of such furnishing of such liquors, in violation of law, are null; saving the rights of third parties.—Q. 41 Vict., cap. 3, ss. 95, 96, 97, 98, 106.

1. The following paragraph is added to article 96, of "The Quebec License Law of 1878."

"And every person, whether a minor or of the age of majority, who purchases, from any person licensed under this act or unlicensed, intoxicating liquors for a person reputed to be an habitual drunkard, is liable for each such offence to a penalty not exceeding fifty dollars or an imprisonment not exceeding three months in default of payment.—Q. 48 Vict., cap. 8, s. 1.

DECISIONS:—1. A *femme couverte*, though she be a *marchande publique*, cannot sue alone. Her husband must be a co-plaintiff with her, or she must be

Digitized by Google

expressly authorized by him to sue.—K. B.—*Young vs. Feehan*, 2 R. de L., p. 437

2. The husband of a married woman who, as a *marchande publique*, sues out a process *ad respondendum*, must be a party to the suit as joint plaintiff with his wife.—K. B.—*Young vs. Feehan*, 3 R. de L., p. 305.

3. La femme séparée quant aux biens contractuellement, peut ester en jugement sans l'assistance ni l'autorisation de son mari pour la conservation de ses biens mobiliers.—BAOQUET & DUVAL, JJ.—*Cary vs. Ryland*, 3 L. C. R., p. 132.

4. L'assistance du mari à une demande judiciaire constitue une autorisation suffisante à la femme de poursuivre ses droits, sans les mots *autorisée par son dit mari à l'effet des présentes*.—Q. B.—*McCormick & Buchanan*, 2 R. L., p. 733.

5. Lorsque le mari poursuit son épouse, celle-ci n'a pas besoin d'être autorisée pour ester en jugement.—Q. B.—*Lussier vs. Archambault*, 2 L. C. J., p. 53.

6. Where a married woman and her husband were each summoned in a cause, and a joint and several condemnation asked against them, the husband being summoned in his own name and right, as well as to authorize his wife, and each appeared and pleaded separately by separate appearances and pleas, but by the same attorney, the wife will be held to be sufficiently authorized to *ester en jugement*.—Q. B.—*McCormick & Buchanan*, 16 L. C. J., p. 243.

7. Lorsque le mari, mis en cause, ne soutient pas sa femme, il n'y a pas besoin de l'autorisation du juge pour qu'elle se défende.—TESSIER, J.—*Bonneau vs. Laterreur*, 1 Q. L. R., p. 351.

8. Qu'une femme poursuivie comme veuve, mais se prétendant sous puissance de mari, peut, sans aucune autorisation, ester en justice, à l'effet de faire connaître au tribunal l'existence de son mari.

Qu'avant d'adjuger sur l'exception à la forme de la défenderesse, la Cour ordonnera que le mari soit mis en cause, sous un délai de quinze jours.—RAINVILLE, J.—*Smith vs. Chrétien*, 23 L. C. J., p. 8.

9. Qu'en vertu de l'article C. C. 176, une femme séparée de biens peut ester en jugement et former opposition à la vente de ses effets mobiliers, sous saisie, sans l'autorisation de son mari.—TORRANCE, J.—*Owens vs. Laflamme*, 24 L. C. J., p. 207.

10. Que la femme séparée de biens et marchande publique peut poursuivre en dommages pour des faits relatifs à son commerce, sans être autorisée par son mari ou par le juge.—MATHIEU, J.—*Méthot vs. Dunn*, M. L. R., 1 S. C., p. 224, 12 R. L., p. 634.

11. Que le défaut d'autorisation de la femme mariée pour ester en justice, doit être plaidé par exception à la forme, et que cette informalité est couverte par la comparution du défendeur et son défaut de l'invoquer dans le délai de la loi.

Qu'il faut procéder par exception à la forme, même dans le cas où la demanderesse allègue qu'elle est autorisée, et où le défendeur nie le fait de cette autorisation. Un plaidoyer au fond contenant ces moyens sera rejeté sur motion. (Examen de la doctrine de l'autorisation nécessaire à la femme pour ester en justice et sur l'effet du défaut d'autorisation.)—C. R.—*Thomas vs. Charbonneau* M. L. R., 1 S. C., p. 253.

12. Qu'il n'est pas nécessaire d'assigner le mari, pour autoriser sa femme séparée de biens, poursuivie sur un billet qu'elle aurait donné à ses créanciers, pour obtenir la radiation d'une hypothèque grévant un de ses immeubles, vû que la signature de ce billet ne constitue qu'un acte d'administration pour lequel la

Digitized by Google

femme n'avait pas besoin d'autorisation.—JETTÉ, J.—*Dudevoir vs. Archambault*, 12 R. L., p. 645.

13. Where a married woman, separated as to property signed a note for $320.55, it was held to be unnecessary to prove an express authorization by the husband and that his endorsement of the note was ample.—TORRANCE, J.—*Johnston vs. Scott*, 3 L. N., p. 171.

14. A wife separate as to property may sue in her own name for rents, without the authorization of her husband.—RAINVILLE, J.—*Desmarteau vs. Baillie*, 3 L. N., p. 100.

15 A married woman authorized by her husband can bring an action of damages in her own name for personal wrongs.—Q. B.,—*Waldron & White*, 11 L. N., p. 53.

See also cases noted at C. C., 1272 & 1298.

177. A wife even when not common as to property, cannot give nor accept, alienate, nor dispose of property *inter vivos*, nor otherwise enter into contracts or obligations, unless her husband becomes a party to the deed, or gives his consent in writing; saving the provisions contained in the act 25 Vict., chap. 66.

If, however, she be separate as to property, she may do and make alone all acts and contracts connected with the administration of her property.—Pothier, *Obl.*, 50, 52; *Puis. marit.*, 2, 15, 34, 42, 43, 71; *Propriété*, 7; *Com.*, 522; *Cout. d'Ord.*, tit. 15, n. 5; Merlin, Rép., vo. *Autorité marit.*, s. 2, § 3, n. 2; 3 Maleville, p. 262; 2 Locré, *Esprit du Code*, 510 et seq.; C. N., 217. [I. 297 to 299.]

NOTE.—The Act referred to in the article is the one authorising persons not in the full exercise of their civil rights to make and withdrawn deposits in the Montreal City and District Savings Bank.

Government Savings Banks are authorized in the same way by the Act D. 34 Vict. cap. 6, s. 7, as also are certain other Savings Banks in the Province of Quebec by the Act D. 34 Vict., cap. 7, s. 16.

DECISIONS:—1. A married woman, although separated as to property and having the *administration de ses biens*, cannot without the express authority of her husband, validly do any act tending to affect and hypothecate her real and immoveable property.—Q. B.—*Rouville & Commercial Bank*, 1 R. de L., p. 406.

2. An action to recover the price of goods sold and delivered to a married woman, separated as to property from her husband, will not be maintained without proof that the husband expressly authorized the purchase by his wife. —SMITH, J.,—*Benjamin vs Clarke*, 3 L. C. J., p. 121.

3. Il y a autorisation suffisante du mari dans cet acte de ratification ou la femme se déclare " dûment assisté, et d'abondant autorisée," sans dire par qui, le mari paraissant à l'acte pour déclarer qu'il ne sait signer, après lecture faite. —Q. B.—*Métrissé & Brault*, 10 L. C. R., p. 157.

4. The promissory note of a married woman, separated as to property from her husband, given for provisions and necessaries used in the family in favour of her

Digitized by Google

husband, and by him endorsed, is valid, without proof of express authority to her to sign the same.—BADGLEY, J.,—*Cholet vs Duplessis*, 12 L. C. R., p. 303.

5. A married woman is not liable for the price of goods, not being necessaries of life, bought by her without the authorization of her husband. Promissory notes signed by a married woman without the authority of her husband are null.—Q. B.—*Danziger & Ritchie*, 8 L. C. J., p. 103.

6. Le dire du shérif dans son rapport du bref *de terris*, que la femme séparée de biens devenue adjudicataire était autorisée par son mari alors présent, n'est point suffisant, sans la production d'une autorisation écrite et précise.—C. R.—*Commissaires d'Ecole de Sorel vs. Crebassa*, 9 L. C. J., p. 23.

7. A contract by a married woman, without marital authority given and shown in the deed containing the contract is invalid.—Q. B.—*Crévier dit Bellerive & Rocheleau*, 16 L. C. R., p. 328.

8. A married woman's note is an absolute nullity as regards her, but the endorser may be liable to the endorsee.—McCORD, J.—*LeBlanc vs. Rollin*, M. C. R., p. 68.

9. A married woman separated as to property, cannot bind herself, without the authorization of her husband, to pay a real estate agent a commission on the sale of land for her.—TORRANCE, J.—*Geddes vs. O'Reilly*, 6 L. N., p. 92.

See also cases noted at C. C., 183, 1292 & 1298.

178. If a husband refuse to authorize his wife to appear in judicial procedings or to make a deed, the judge may give the necessary authorization—Cout. Paris, 224; Pothier, *Puis. marit.*, 12, 57, 59; *Cout. d'Orl.*, tit. 10, no. 201; 3 Pand. Franç., 421-2-3-4; Merlin, Rép., vo. *Aut. marit.*, sec. 8, nos 2 et seq.; 5 Toullier, pp. 78, 209; C. N., 218. [I. 299.]

DECISION:—Lorsque le mari, mis en cause, ne soutient pas sa femme, il n'y a pas besoin de l'autorisation du juge pour qu'elle se défende.—TESSIER, J.—*Bonneau vs. Lateneur*, 1 Q. L. R., p. 351.

179. A wife who is a public trader may, without the authorization of her busband, obligate herself for all that relates to her commerce; and in such case she also binds her husband, if there be community between them.

She cannot become a public trader without such authorization express or implied.—Cout. de Paris, 235, 236; Pothier, *Puis. marit.*, 20, 21, 22; *Cout. d'Orl.*, tit. 10, nos. 196-7; 1 Arrêtés de Lamoignon, tit. 32, art. 82; C. N., 220. [I. 299.]

DECISIONS:—1. Un billet promissoire signé par une femme séparée de biens, sans le concours de son mari, est valable, cette femme prenant, à l'époque où le billet était ainsi donné, la qualité de marchande publique.—Q. B.—*Beaubien & Hutson*, 12 L. C. R., p. 47.

2. A wife, separated as to property from her husband, who presented a petition asking to be allowed to do business as a *marchande publique*, alleging her husband to be an absentee in parts unknown, was allowed so to do. (The

Digitized by Google

formalities to be observed by a married woman desiring to become a *marchande publique* are prescribed in C. C. P., 981.)—TORRANCE, J.—*In re Gagnon*, 4 L. N., p. 108.

3. Que la femme marchande publique ne pourrait se dégager de son obligation personnelle, même en renonçant à la communauté, sauf le recours contre son mari ou sa succession. Elle est alors dans le cas d'une femme qui a souscrit une obligation avec l'autorisation du mari.—(C. C., 1382.)—MOUSSEAU, J.—*Perrier vs. Quinn*, 8 L. N., p. 19.

4. Que la femme, séparée de biens et marchande publique peut poursuivre en dommage pour des faits relatifs à son commerce, sans être autorisée par son mari ou par le juge.—MATHIEU, J.—*Methot vs. Dunn*, 12 R. L., p. 634, M. L. R., 1 S. C., p. 224.

5. Qu'une femme mariée non séparée de biens et qui fait commerce comme marchande publique, ne s'engage pas personnellement, mais seulement comme commune.—JETTÉ, J.—*Bourgoin vs. Roy*, M. L. R., 3 S. C., p. 168.

180. If a husband be interdicted or absent, the judge may authorize his wife, either to appear in judicial proceedings or to contract.—Pothier, *Puis. marit.*, 25-6-7-8; 3 Pand. Franç., 397-8; Fenet-Pothier, sur art. 222, p. 57; C. N., 222. [I. 299.]

DECISION:—La femme, dont le mari est absent, peut être autorisée par justice à ester en jugement mais ce ne peut être que pour la poursuite des droits qui lui sont propres et non de droits appartenant à la communauté, qui n'est pas dissoute et dont elle n'a pas l'administration.—CASAULT, J.—*Dasylva vs. Lizotte*, 13 Q. L. R., p. 162.

181. All general authorizations, even those stipulated by marriage contract, are only valid in so far as regards the administration of the wife's property.—Pothier, *Intr. à Communauté*, 5; *Puis. marit.*, 67; Denizart, *Actes de notoriété*, 22 fév', 1695, 12 nov., 1699, 23 fév., 1708; Le Prêtre, cent. 1, c. 67; 3 Pand. Franç., p. 435; C. N., 223. [I. 299.]

182. A husband although a minor may, in all cases authorize his wife who is of age; if the wife be a minor, the authorization of her husband, whether he is of age or a minor, is sufficient for those cases only in which an emancipated minor might act alone.—1 Maleville, 208; Lacombe, vo. *Autorisation*, n. 6; 3 Pand., Franç., n. 206, p. 436; Merlin, vo. *Autorisation*, s. 5, § 2, pp. 182-3; C. N., 224. [I. 299.]

183. The want of authorization by the husband, where it is necessary, constitutes a cause of nullity which nothing can cover, and which may be taken advantage of by all those who have an existing and actual interest in doing so.—Pothier, *Puis. marit.*, 74-5; 2 Merlin,

Digitized by Google

vo. *Autorisation*, 174-5; 2 Toullier, n. 661; 1 Marcadé, n. 749, note 1, p. 567; 2 DeMoly, p. 436; 3 Zacharie, p. 343; 2 Duranton, n. 515; 1 Delsol, p. 204; C. N., 225. [I. 299.]

DECISIONS:—1. Qu'une femme, commune en biens et sous puissance de mari, ne peut valablement faire assurer les meubles de son ménage sans l'autorisation de son mari; et que le fait de n'avoir pas ainsi déclaré son état à la compagnie, rend nulle la police. (C. C. 177, 1296 & 2571).—TASCHEREAU, J.—*Rousseau vs Royal Insurance Company*, M. L. R., 1 S. C., p. 395.

2. Que le billet promissoire consenti sans autorisation, par une femme commune en biens est nul.—CASAULT, J.—*Norris vs. Condon*, 14 Q. L. R., p. 1.

But, held by STUART, C. J.—That a married woman may act alone as the agent of her husband in a matter in which he only is interested and by which he benefits. In such case, the act of the wife is in reality the act of the husband.—C. R.—*Norris vs. Condon*, 14 Q. L. R., p. 184.

See also cases at C. C. 177, 1292 & 1298.

184. A wife may make a will without the authorization of her husband.—Pothier, *Puis. marit.*, 43-47; *Donat. test.*, c. 3, s. 1; 3 Pand. Franç., p. 442; C. N., 226. [I. 299.]

CHAPTER SEVENTH.

OF THE DISSOLUTION OF MARRIAGE.

185. Marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble.—Pothier, *Mariage*, 462-7; Gousset, Code civil, sur art. 25, 94; 3 Pand. Franç., p. 446; 2 Duranton, No. 520; C. N., 227. [I. 299.]

Digitized by Google

TITLE SIXTH.

OF SEPARATION FROM BED AND BOARD.

CHAPTER FIRST.

OF THE CAUSES OF SEPARATION FROM BED AND BOARD.

186. Separation from bed and board can only be demanded for specific causes; it cannot be based on the mutual consent of the parties.—Rousseau de Lacombe, vo. *Séparation*, No. 9, p. 639; Pothier, *Mariage*, 517; 2 Pigeau, pp. 200, 213, 240; 1 Maleville, 272; 4 Pand. Franç., p. 149; C. N., 306. [I. 301.]

DECISIONS :—1. Que dans une action en séparation de corps et de biens, l'allégué suivant de la déclaration, "the whole as confessed and admitted by defendant," peut être rejeté sur motion.—LORANGER, J.—*Smith vs Wheeler*, M. L. R., 1 S. C., p. 80.

2. Que dans une instance en séparation de corps et de biens, l'époux peut interroger comme témoin l'époux défendeur dans le but d'en obtenir la contradiction des allégations de l'action. CHAGNON, J.—*Hébert vs Callaerts*, 14 R. L., p. 183.

3. Under no circumstances can the defendant be examined, in an action *en séparation de corps*, to prove the plaintiff's case.—PAPINEAU, J.—*Ducharme vs Loyselle*, 27 L. C. J., p. 145.

4. Que dans une action en séparation de corps et de biens, la Cour ou un juge a un pouvoir discrétionnaire d'admettre le témoignage de l'une ou de l'autre des parties, et lorsqu'il ne paraît pas avoir de collusion, ce témoignage devrait être admis.—JETTÉ, J.—*Moore vs Duclos*, M. L. R., 2 S. C., p. 254.

187. A husband may demand the separation on the ground of his wife's adultery.—Pothier, *Mariage*, 525; 2 Pigeau, 239; C. N., 229. [I. 301.]

DECISION :—The fact of adultery may be inferred from circumstances that lead to it by fair inference. So where it was proved that the wife, defendant, under an assumed name, had occupied the same stateroom with one B. during a voyage to Europe and had subsequently lived with B. as his housekeeper or guest, together with other facts, not rebutted in any way, pointing to a criminal relation, adultery was inferred without direct evidence of the fact.—TORRANCE, J. —*Lefaivre vs Bell*, 5 L. N., p. 106.

Digitized by Google

188. A wife may demand the separation on the ground of her husband's adultery, if he keep his concubine in their common habitation.—Cod. L. 8, *De repudiis*; Novel, 22, c. 15, § 1; 117, c. 9, § 5, *Adultère*, p. 13; Guyot, vo. *Adultère*, p. 196; 2 Pigeau, 209, 210, 211; Lacombe, vo. 223; Merlin, Rép., vo. *Adultère*, 243, no. 8 *bis*; C. N., 230. [I. 301.]

189. Husband and wife may respectively demand this separation on the ground of outrage, ill-usage or grievous insult committed by one toward the other.—2 Pigeau, 236–9; Gousset, p. 96; 4 Pand. Franç., 35; C. N., 231. [I. 301.]

DECISIONS:—1. La démence, la folie et la fureur du mari ne sont pas des motifs qui peuvent justifier une demande en séparation de corps de la part de la femme.—Q. B.—*Villeneuve et Bédard*, 3 R. L., p. 453.

2. In an action brought by a wife against her husband for separation *de corps et de biens*, where both parties are proved to have been guilty of gross immorality, the husband's conclusions to have the wife deprived of her rights in the community will not be granted.—Berthelot, J.—*Bisson vs Lamoureux*, 17 L. C. R., p. 140.

3. Dans une action en séparation de corps, la réciprocité des torts ne peut être opposée par l'époux défendeur pour demander le renvoi de l'action.—Taschereau, J.,—*Brennan vs McAnnally*, 21 L. C. J., p. 301.

4. In an action for *séparation de corps et de biens*, the proof being only sufficient to establish mere incompatibility of temper, such incompatibility cannot justify a judicial divorce.—Badgley, J.,—*Turgeon vs Turgeon*, 1 L. C. L. J., p. 109.

5. In an action for *séparation de corps et de biens*, brought by the wife on the ground of the severity of her husband's treatment, the defence proved the adultery of the wife. The separation was granted, but the wife was deprived of her marital advantages.—C. R.,—*G. vs L.*, M. C. R., p. 86.

6. That on proof of the communication of venereal disease by the husband to the wife, and that their common life has become impracticable, it is duty of the Court to pronounce judgment of *séparation de corps*.—C. R.—*Desylva vs Plante*, 27 L. C. J., p. 53, 5 L. N., p. 41.

7. In this case there was evidence of sufficient ill treatment to justify a *séparation de corps et de biens*.—Q. B.,—*Rhéaume & Massé*, 5 L. N., p. 298.

190. The grievous nature and sufficiency of such outrage, ill-usage and insult, are left to the discretion of the court which, in appreciating them, must take into consideration the rank, condition and other circumstances of the parties.—Pothier, 508; 2 Pigeau, 203; Gousset, p. 96. [I. 301.]

DECISIONS:—1. In general nothing less than future danger to life or limb will support an action *en séparation de corps*. Yet under peculiar circumstances, such as disparity of age, if the general conduct of the husband exhibits violent treatment, contempt hatred, or neglect, though danger to life or limb cannot be inferred, it is, in an aggravated form, sufficient.—K. B.,—*Chalou vs Trahan*, I. R. de L., p. 507.

Digitized by Google

2. A general allegation of ill treatment will not support an action *en séparation de corps*. The facts on which the demand is founded must be set forth specially as to time, place and circumstance.—K. B.,—*Boulanger vs Wheat*, 1 R. de L., p. 508.

3. A confirmed habit of intoxication is a menace of danger in its consequences and as such a legal cause of *séparation de corps*.—K. B.,—*Craven vs Craven*, 1 R. de L., p. 508.

191. The refusal of a husband to receive his wife and to furnish her with the necessaries of life, according to his rank, means and condition, is another cause for which she may demand the separation.—Pothier, 511 ; 2 Pigeau, 205. [I. 301.]

DECISIONS :—1. Que le refus de la connaître charnellement ne peut être une cause de séparation de corps pour la femme que lorsqu'il est dû à la haine, à l'aversion ou au mépris du mari.

Que les pratiques honteuses auxquelles se livre le mari, ne peuvent être une cause de séparation que lorsqu'il se les permet en présence de sa femme.—CASAULT, J.,—*Brunet vs Leroux*, 8 Q. L R., p. 349.

2. Qu'il y a lieu à la séparation de corps et de biens, à la poursuite de la femme, si le mari l'abandonne pour aller vivre dans une autre Province, et ne lui fournit pas les choses nécessaires à la vie.—MATHIEU, J.,—*Dennehey vs Spring*, 13 R. L., p. 59.

3. An action *en séparation de corps* by a husband, based on the sole allegation of abandonment by the wife of the matrimonial domicile, is good in law.—C. R.—*Leriger dit Laplante vs Pinsonneault*, 7 L. N., p. 311.

CHAPTER SECOND.

OF THE FORMALITIES OF THE ACTION FOR SEPARATION FROM BED AND BOARD.

192. The action for separation from bed and board is brought before the competent court of the district in which the consorts have their domicile.—Pothier, 518 ; 2 Pigeau, 214 ; C. N., 234. [I. 301.]

193. This action is brought, tried and decided in the same manner as all other civil actions, with this difference, that the parties cannot admit the allegations, proof of which must always be made before the court.—Pothier, 519; 1 Pigeau, 228 ; 2 Pigeau, 226 ; 4 Pand. Franç., nn. 127 et seq., 152; C. N., 307. [I. 301.]

DECISION :—Dans une action en séparation de corps, portée par le mari contre la femme, il n'est pas nécessaire de donner avis dans la *Gazette Officielle*, ni dans deux journaux, malgré que telle demande entraîne la séparation de biens. —MEREDITH, C. J.—*Leclerc vs Lord*, 4 R. L., p. 531.

See cases noted at C. C. 186.

Digitized by Google

194. The wife must apply, by a petition setting forth her reasons and addressed to the judge, to be authorized to sue, and to be allowed to withdraw pending the suit to a place which she indicates.—Pothier, 518; 2 Pigeau, 216. [I. 301.]

DECISION:—Que lorsqu'une femme est autorisée en justice à poursuivre son mari en séparation de corps, elle a le droit, si elle n'a pas les moyens de faire elle-même les déboursés et que son mari peut les faire, d'obtenir une ordonnance de la Cour contre le mari lui enjoignant de payer les déboursés.—MATHIEU, J.—*Desoliers vs. Lynch*, M. L. R., 3 S. C., p. 275.

195. If the alleged wrongs be found sufficient, the judge, in according to the wife the authorization to sue, allows her to leave her husband and to reside elsewhere during the suit.—Pothier, *loc. cit.*; 2 Pigeau, 218; C. N., 268. [I. 303.]

196. The action for separation from bed and board is extinguished by a reconciliation of the parties taking place either since the facts which gave rise to the action, or after the action brought.—Pothier, 520; 2 Pigeau, 219; C. N., 272. [I. 303.]

DECISION:—The effect of a reconciliation between a husband and wife is to extinguish an action *en séparation de corps* pending between them, and consequently, the plaintiff's attorneys could not legally continue the proceedings to recover their own costs.—C. R.—*Gérard vs. Lemire*, 24 L. C. J., p. 42.

197. In either case the action is dismissed. The plaintiff may nevertheless bring another, for any cause which has happened since the reconciliation, and may in such case make use of the previous causes in support of the new action.—Pothier, 520; 2 Pigeau, 219; C. N., 273. [I. 303.]

198. If the action be dismissed the husband is obliged to take back his wife, and the wife is obliged to return to her husband, within such delay as the court by its judgment determines.—Pothier, 521; 2 Pigeau, p. 232; 4 Pand. Franç., 77. [I. 303.]

199. When the action is brought for outrage, ill-usage, or grievous insult, although the same be well established, the court may refuse to grant the separation forthwith, and may suspend its judgment until a further day, which it appoints in order to afford the parties sufficient time to come to an understanding and reconciliation. —2 Pigeau, 231: 2 Duranton, 610; C. N., 259. [I. 303.]

Digitized by Google

CHAPTER THIRD.

OF THE PROVISIONAL MEASURES TO WHICH THE ACTION FOR SEPARATION FROM BED AND BOARD MAY GIVE RISE.

200. The provisional care of the children remains with the father, whether plaintiff or defandent, unless the court or judge orders otherwise for the greater advantage of the children.—4 Pand. Franç., p. 90, n. 66; Massol, Séparation, 151 et seq.; 4 Locré, *Esprit du Code*, pp. 332 et seq.; C. N., 267. [I. 303.]

DECISION:—Where judgment of separation from bed and board has been pronounced, the husband cannot, on summary petition, not in a pending case, without a writ of summons, obtain an order to permit him to see his child, the custody of which was given to the mother.—TORRANCE, J.—*Ex parte Pillet & Delisle*, 7 L. N., p. 78.

201. A wife sued in separation may leave her husband's domicile, and reside during the suit in a place indicated or approved of by the court or judge.—Pothier, 518. [I. 303.]

202. Whether the wife is plaintiff or defendant, she may demand an alimentary pension, in proportion to her wants and the means of her husband; the amount is fixed by the court, which also orders the husband, if necessary, to deliver to the wife at the place to which she has withdrawn, the clothing she may require.—Pothier, *eod. loc.*; 2 Pigeau, 216; 2 Duranton, nn. 595, 612; C. N., 268; C. P. C., 878. [I. 303.]

DECISIONS:—1. Que lorsqu'un jugement a été rendu, portant condamnation pour le paiement d'une somme déterminée à titre de pension alimentaire, le jugement doit être exécuté de la manière ordinaire, et que le créancier ne peut poursuivre par voie d'action le recouvrement de la pension portée dans le jugement.—CHAGNON, J.—*David vs. Dupaul*, 13 R. L., p. 425.

2. The wife sueing for separation from bed and board is not entitled to ask that the Defendant be forclosed from making proof unless he pay the fees due to her attorney.—TORRANCE, J.—*McDougall vs. Scott*, 4 L. N., p. 323.

3. Que la femme poursuivie en séparation de corps et qui est sans ressources a droit provisoirement à une pension alimentaire quoique par la preuve faite sur la requête pour pension il soit établi que la femme s'est rendue coupable d'adultère.—GILL, J.—*Sabourin vs. Fortin*, 16 R. L., p. 56.

4. Qu'il n'y a lieu à la révision devant trois juges, d'un jugement rendu sur la requête pour pension alimentaire, faite par la femme dans une action en séparation de corps.—C. R.—*Sabourin vs. Fortin*, 16 R. L., p. 59.

Digitized by Google

203. [If the wife leave the place of residence assigned to her without the permission of the court or judge, the husband may claim to be liberated from the payment of the alimentary pension; he may even have her action dismissed, saving her recourse, should she refuse to obey the order given her to return within a given delay to the place she has thus quitted.]—2 Duranton, n. 578; C. N., 269. [I. 303.]

204. A wife who is in community as to property, whether plaintiff or defendant in an action for separation from bed and board, may, from the date of the order mentioned in articles 195 and 201, obtain permission from the court or judge, to cause the moveable effects of such community to be attached for the preservation of the share which she will have a right to claim when the partition takes place; in consequence of which, her husband is bound as judicial guardian, to represent the things seized or their value when required. —2 Toullier, p. 59; 2 Pigeau, 184; 1 Maleville, 250; 4 Pand. Franç., 94; C. N., 270. [I. 303 to 305.]

DECISION:—An attachment, in an action *en séparation de corps et de biens*, of the husband's moveables, to protect the Plaintiff's right in the community, was sustained.—TORRANCE, J.—*Gagnon vs Lalonde*, 4 L. N., p. 85.

205. All obligations contracted by a husband, affecting the community, and all alienations made by him of the immoveable property of such community, subsequent to the rendering of the order mentioned in articles 195 and 201, are declared null, if it be established that such obligations or alienations were contracted or made in fraud of the rights of his wife.—4 Pand. Franc., 96. [I. 305.]

CHAPTER FOURTH.

OF THE EFFECTS OF SEPARATION FROM BED AND BOARD.

206. Separation from bed and board, from whatever cause it arises, does not dissolve the marriage tie; neither husband nor wife, therefore, can contract a new marriage while both are living.—Pothier, 523. [I. 305.]

207. The separation relieves the husband from the obligation of receiving his wife, and the wife from that of living with her husband; it gives the wife the right of choosing for herself a domicile other than that of her husband.—Pothier, 522; Bouhier, Cout.

Digitized by Google

Bourg., ch. 22, n. 201; 2 Toullier, n. 773; Proudhon, Cours de Dr. Fr., ch. 19, § 3; Massol, p. 198; 4 Pand. Franç., p. 163. [I. 305.]

208. Separation from bed and board carries with it separation of property; it deprives the husband of the rights which he had over the property of his wife, and gives to the wife the right to obtain restitution of her dowry, and of the property that she brought in marriage.

Unless by the judgment they are declared forfeited, which only takes place in the case of adultery, the separation also gives the wife the right to claim the benefit of all the gifts and advantages conferred on her by the marriage contract; saving the rights of survivorship, to which such separation does not give rise, unless the contrary has been specially stipulated.—Pothier, 522; 4 Pand. Franç., 163-4: C. N., 311, 1452. [I. 305.]

209. When community of property exists, the separation operates its dissolution, imposes on the husband the obligation of making an inventory, and gives to the wife, in case of acceptance, the right to demand the partition of the property, unless by the judgment she has been declared to have forfeited this right.—Pothier, *eod. loc.;* 4 Pand. Franç., *eod. loc.* [I. 305.]

★ **210.** The separation renders the wife capable of suing and being sued, and of contracting alone, for all that relates to the administration of her property; but for all acts and suits tending to alienate her immoveable property, she requires the authorization [of a judge.]—Pothier, *eod. loc.;* 4 Pand. Franç., 164. [I. 305.]

Amendment:—1. Article 210 of the civil code is amended, so as to read as follows:

"210, The separation renders the wife capable of suing and being sued, and of contracting alone, for all that relates to the administration of her property; but for all acts and suits tending to alienate her immoveable property, she requires the authorization of her husband, or upon his refusal the authorization of a judge.—Q. 39 Vict., c. 24.

211. For whatever cause the separation takes place, the party against whom it has been declared, loses all the advantages granted by the other party.—2 Pigeau, 233; 1 N. Deniz., p. 291; 8 *Ibid.*, 543; 4 Pand. Franç., 135-6; 2 Duranton, no. 629; 1 Paillet, *Manuel de*

Digitized by Google

Droit Français (Edit. Lenormand), 110-1; Lahaye, sur art. 299; Massol, 297, 299, 305, 306; 4 Anc. Deniz., vo. *Révocation*, 386; 16 Merlin, Rép. 61; 2 Nouv. Pigeau, 571; 1 Maleville, p. 269; C. N., 299, 1452. [I. 305.]

DECISIONS:—Les cours en Canada ont droit de déclarer la femme déchue de ses avantages matrimoniaux, dans une action en séparation de corps et de biens, pour cause d'adultère.—Q. B.—*Cherrier & Bender*, 3 L. C. R., p. 418.

2. An adulteress loses all the advantages granted to her by her husband but not her part of the community, which is regarded, not as a gift from her husband, but as representing what she contributed to, or earned, or saved for the community.—MEREDITH, C. J.—*L'Heureux vs Boivin*, 7 Q. L. R., p. 220.

3. In an action for *séparation de corps et de biens*, for adultery, the wife, defendant, cannot plead in *bar* acts of adultery on the part of the husband, plaintiff.—TORRANCE, J.—*Lefaivre vs Bell*, 4 L. N., p. 298.

4. That the wife *commune en biens* may be declared by the Court to have forfeited her share in the community when proved guilty of adultery. The Civil Code has not altered the old law in force in this country, in that respect.—BUCHANAN, J.—*Washer vs Hawkins*, 11 L. N., p. 266.

See cases noted at C. C., 189, nn. 2 and 5.

212. The party who has obtained the separation, retains all the advantages granted by the other, although they may have been stipulated to be reciprocal and the reciprocity does not take place.—2 Pigeau, 233-4; 4 Pand. Franç., 135; C. N., 300. [I. 307.]

DECISION:—The usufruct of moveable property inherited by the husband though declared by the testator to be inalienable, non-assignable and not seizable, may be seized in execution of a judgment of *séparation de corps*, condemning the husband to pay to his wife an alimentary allowance.—TORRANCE, J.—*Maguire vs Huot*, 5 L. N., p. 374.

213. Either of the parties thus separated, not having sufficient means of subsistence, may obtain judgment against the other for an alimentary pension, which is fixed by the court, according to the condition, means and other circumstances of the parties.—Massol, 194; 2 Duranton, n. 633; 4 Pand. Franç,, 165, n. 134; 2 Pigeau, 234; 2 Toullier, n. 780; 1 Nouv. Deniz., vo. *Aliments*, 453; Merlin, Rép., vo. *Aliments*, § 3, p. 176; C. N., 301. [I. 307.]

DECISION:—When the judgment maintains a demand for separation from bed and board, based on the desertion of the husband and his refusal to support his wife, the infidelity of the wife does not deprive her of the right to an alimentary allowance.—TAIT, J.—*Desmarais vs Gagnon*, M. L. R., 3 S. C., p. 377.

214. The children are entrusted to the party who has obtained the separation, unless the court, after having, if it think proper, consulted a family council, orders, for the greater advantage of the

Digitized by Google

children, that all or some of them be entrusted to the care of the other party, or of a third person.—2 Pigeau, 233; 9 Fenet, *Travaux prép.*, 486; Massol, 321-2; 1 Paillet, 111; 2 Duranton, 580, n. 636; 1 Rogron, 205; C. L., 153; C. N., 302. [I. 307.]

215. Whoever may be entrusted with the care of the children, the father and mother respectively retain the right of watching over their maintenance and education, and are obliged to contribute thereto in proportion to their means.—2 Pigeau, 233; 4 Pand. Franç., 140-1; C. N., 303. [I. 307.]

216. Separation from bed and board judicially declared does not deprive the children, issue of the marriage, of any of the advantages allowed them by law or by the marriage covenants of their father and mother; but these rights only become open in the same way and under the same circumstances as if there had been no such separation.—4 Pand. Franç., 142; C. N., 304. [I. 307.]

217. Husband and wife thus separated, for any cause whatever, may at any time reunite and thereby put an end to the effects of the separation.

By such reunion, the husband reassumes all his rights over the person and property of his wife, the community of property is re-established of right and, for the future, is considered as never having been dissolved.—Pothier, *Mariage*, 524. [I. 307.]

TITLE SEVENTH.

OF FILIATION.

CHAPTER FIRST.

OF THE FILIATION OF CHILDREN WHO ARE LEGITIMATE OR CONCEIVED DURING MARRIAGE.

218. A child conceived during marriage is legitimate and is held to be the child of the husband. A child born on or after the one hundred and eightieth day after the marriage was solemnized, o

Digitized by Google

within three hundred days after its dissolution, is held to have been conceived during marriage.—Authorities under next article. [I. 307.]

DECISION:—L'épouse du demandeur était accouchée cinq mois après son mariage. Le demandeur porte une action pour nourriture de bâtard et en déclaration de paternité contre le défendeur réputé père de l'enfant. Jugé, que le demandeur n'avait pas en loi une action de cette nature contre le défendeur.—C. R.—*Lamirande vs Dupuis*, M. C. R., p. 71.

219. The husband cannot disown such a child even for adultery, unless its birth has been concealed from him; in which case he is allowed to set up all the facts tending to establish that he is not the father.— 8 N. Deniz, pp. 5 et seq.; *ff* L. 6, *de his qui sui vel alieni*, *ff* L. 11 p. 9, *ad legem julianam de adulteris;* 3 Henrys, liv. 6, ch. 5, *quest.* 38, pp. 850-4; Lebrun, *Success.*, liv. 1, ch. 4, sec. 2, n. 6, p. 52; 2 Touillier, n. 789; Merlin, Rép., vo. *Légitimité*, sec. 2, § 2, nn. 4, 5: 4 Pand. Franç., 186-7; C. N., 313. [I. 309.]

220. Neither can the husband disown the child on the ground of his impotency, either natural or caused by accident before the marriage. He may nevertheless disown it if, during the whole time that it may legally be presumed to have been conceived, he were, by reason of impotency not existing at the time of the marriage, of distance, or of any other cause, in the physical impossibility of meeting his wife.—*ff* L. 6, *de his qui sui vel alieni*; Lebrun, *Suc.*, liv. 1, c. 4, sec. 2, nn. 3, 4; 3 Henrys, liv. 6, c. 5, quest. 38, p. 850–854; Merlin, Rép., vo. *Légitimité*, sec. 2, § 2; Guyot, Rép. vo. *Légitimité*, pp. 379 et seq.; 2 Toullier, nn. 791 799; 4 Pand. Franç., 179, 180, 183; C. L., 208; C. N., 312. [I. 309.]

221. A child born before the one hundred and eightieth day after the marriage was solemnized, may be disowned by the husband. —*ff* L. 12, *de statu hominum*; *Cod.*, L. 4, *de posthumis hæredibus*; Pothier, *Succes.*, p. 8; Guyot, Rép., vo. *Légitimité*, 372; 2 Pand. Franç., 181; 2 Toullier, n. 791: 2 Boileux, 62, 66, 67; C. N., 314. [I. 309.]

222. Nevertheless a child born before the one hundred and eightieth day of the marriage, cannot be disowned by the husband in the following cases:

1. If he knew of the pregnancy before the marriage;
2. If he were present at the act of birth, or if that act be signed by him, or contain the declaration that he cannot sign:

Digitized by Google

3. If the child be not declared viable.—2 Toullier, nn. 821 et seq.; 4 Pand. Franc., 188-9; Merlin, vo. *Légitimité*, sec. 2, § 1, n. 4; C. N., 314. [I. 309.]

223. In all the cases where the husband may disown the child, he must do so:

1. Within two months, if he be in the place at the time of the birth;

2. Within two months after his return, if absent at the time of the birth;

3. Within two months of the discovery of the fraud, if the birth have been concealed from him.—C. N., 316; C. L., 210. [I. 309.]

224. If the husband die before disowning the child, but still being within the delay allowed for so doing, the heirs have two months to contest the legitimacy of the child from the time he has taken possession of the property of the husband, or from the time that the heirs have been disturbed by him in their possession.—C. N., 317; C. L., 211. [I. 309.]

225. Such disavowal, on the part of the husband or of his heirs, must be made by an action at law, directed against the tutor, or tutor *ad hoc*, appointed to the child, if he be a minor; and the mother, if living, must be made a party to the action.—2 Marcadé, p. 22; 5 Demolombe, nn. 164, 170, 365; 4 Pand. Franç., 192-3; 5 Locré, *Esprit du Code*, 112 et seq.; Rogron, sur art, 318; 2 Boileux, 88; 2 Toullier, nn. 842-3; C. N., 318. [I. 309 to 311.]

226. If the disavowal do not take place, [as prescribed in the present chapter,] the child which might have been disowned is held to be legitimate.—Consequence *contrario* of this chapter. [I 311.]

227. A child born after the three hundreth day from the dissolution of the marriage is held not to be the issue thereof and is illegitimate.—*ff* L. 3, p. 11, *de suis et legit. hær.*; Ferrière, Dict. de Droit, vo. *Naissance;* Guyot, Rép., *eodem verbo;* Ferrière, Cout. de Paris, art. 118, glose 3, sect. 2, § 1, nn. 22, 23, 24; Lebrun, Successions, livre 1, c. 4. sect., n. 12; Merlin, Rép., vo. *Légitimité*, sect. 2, § 3; Favard de Langlade, Conf. sur l'art. 315, vol. 2, p. 273; 1 Maleville, p. 280. [I. 311.]

Digitized by Google

CHAPTER SECOND.

OF THE EVIDENCE OF THE FILIATION OF LEGITIMATE CHILDREN.

228. The filiation of legitimate children is proved by the acts of birth inscribed in the registers of civil status.—*ff* L. 14 *De probationibus*; Cod. L. 15 *De probationibus*; C. S. L. C., c. 20, § 13; C. N., 319. [I. 311.]

DECISION:—Dans l'espèce, l'extrait de baptême produit, prouve la possession d'état de Marguerite Fraser comme fille légitime de feu Alexandre Fraser et Angélique Meadows.—CARON, J.—*Fraser vs Pouliot*, 13 R. L., p. 1.

But see decisions of Queen's Bench.—Q. B.—8 L. N., p. 178, 12 Q. L. R., p. 327.—SUPREME COURT.—4 S. C. R., p. 515; 10 L. N., p. 12.

229. In default of such act, the uninterrupted possession of the status of a legitimate child is sufficient.—Cod. L. 9 *de nuptiis*; 4 Daguesseau, 47e *Plaidoyer;* 2 Cochin (*Edit.*1821), pp. 43 et seq.; 2 Despeisses, 35; 3 Pand. Franç., 198-9; C. L., 213, C. N., 314. [I. 311.]

DECISION: Que l'adjudicataire d'un immeuble substitué, autorisé à garder entre ses mains partie du prix de l'adjudication jusqu'à l'ouverture de la substitution sous condition de la rapporter lors de cette ouverture, est lié par la reconnaissance faite par ses auteurs de l'état civil du grevé qui demande le rapport des deniers.—Q. B.—*Beaudry & Chevalier*, M. L. R., 3 Q. B., p. 159.

230. Such possession is established by a sufficient concurrence of facts, indicating the connection of filiation and relationship between the individual and the family to which he claims to belong.—Cod., L. 9, *De nuptiis;* N. Deniz., vo. *Etat*, pp. 9 et seq.; 1 Bourjon, pp. 17-18; 2 Cochin, 43 et seq.; 2 Daguesseau, 256; 2 Toullier, nn. 871 et seq.; 5 Locré, *Esprit du Code*, 125 et seq.; C. N., 321. [I. 311.]

231. No one can claim a status contrary to that which his act of birth, accompanied with the possession conformable to such act, gives him; and reciprocally no one can contest the status of him who has a possession conformable to his act of birth.—2 Cochin, 107; 4 Cochin, 345; N. Deniz., vo. *Etat*, (Quest. d'état), 9; 2 Toullier, n. 881; 5 Demolombe, n. 219; 3 Pand. Franç., p. 200; C. N., 322. [I. 311.]

DECISION—Que l'article 231 C. C., qui met à l'abri de toute contestation d'état celui qui a une possession conforme à son acte de naissance, ne peut être invoqué par les enfants naturels. Qu'en conséquence, la possession d'enfant

Digitized by Google

naturel jointe à une reconnaissance, ne constitue qu'une présomption dont les tribunaux peuvent tenir compte pour déclarer ou admettre la contestation des intéressés.—COUR D'APPEL DE PARIS.—*Barrandi & Barrandi*, 8 L. N., p. 349.

232. In default of the act of birth and of an uninterrupted possession, or if the child have been described either under false names, or as being the child of unknown parents, the proof of filiation may be made by testimony; nevertheless this evidence can only be admitted when there is a commencement of proof in writing, or when the presumptions or indications resulting from facts then ascertained, are sufficiently strong to permit its admission.—Cod., L. 2, *de testibus;* L. 6, *de fide instrum;* L. 9, *de nuptiis;* Arrêt, 16 mars 1641; Ord., 1667, tit. 20, art. 14; Guyot, Rép., vo. *Légitimité*, s. 2, § 4, n. 5; 4 Cochin, 344, 346, 483, 486; Lacombe, vo. *Etat*, 270; C. S. L. C., c. 20, s. 13; Merlin, Rép., vo. *Naissance; Ibid.*, vo. *Quest. d'état*, §§ 1 et seq.; 2 Toullier, n. 883; 4 Pand. Franç., 201-202; 5 Locré, 140-1; C. N., 323. [I. 311.]

233. A commencement of proof in writing results from the title-deeds of the family, the registers and papers of the father and mother, from public and even private writings proceeding from a party engaged in the contestation, or who would have had an interest therein had he been alive.—*ff.* L., 29, *de probationibus;* Ord. 1667, tit. 20, art. 14; 5 Locré, 141-2-3; 2 Toullier, nn. 890 et seq.; Rodier, sur ord. 1667, tit. 20, art. 14; C. S. L. C., c. 20, s. 13; 4 Pand. Franç., 203; C. N., 324. [I. 313.]

234. Proof of the contrary may be made by any means of a nature to establish that the claimant is not the child of the mother he claims to have, or even, the maternity being proved, that he is not the child of the husband of such mother.—C. S. L. C., c. 20, s. 13; 1 Jousse, ord. 1667, tit. 20, art. 1, p. 344; 2 Toullier, nn. 820, 893 et seq.; 4 Pand. Franç., 204-5; C. L., 216; C. N., 325. [I. 313.]

235. The action of a child to establish his status is imprescriptible.—2 Toullier, n. 908; 2 Marcadé, pp. 35-6; Lahaie sur art. 328: C. N., 328. [I. 313.]

236. This action cannot be brought by the heirs of a child who has failed to bring it, unless he died in minority, or within five years after his majority; but they may continue the action already brought.—*ff* L. 1, *ne de statu defunctorum*; Dunod, *Prescrip.*, part. 2,

Digitized by Google

c. 7, pp. 159 et seq.; 2 Henrys, liv. 4, Quest. 28; Lacombe, 270-1, vo. Etat, n. 4; 2 Marcadé, 36 et seq.; 1 Biret, *Explic. du Code*, 102; 2 Toullier, nos. 911 et seq.; Merlin, vo. *Légitimité*, sec. 4, n. 1, pp. 471 et seq.; C. N., 329. [I. 313.]

CHAPTER THIRD.

OF ILLEGITIMATE CHILDREN.

237. Children born out of marriage, other than the issue of an incestuous or adulterous connection, are legitimated by the subsequent marriage of their father and mother.—Pothier, *Mariage*, nn. 408, 411, 412, 415, 422; *Des Personnes*, tit. 4, pp. 601-602; Successions, sec. 2, c. 1, art. 3, § 5, p. 20; Fenet-Pothier, sur art. 331, pp. 77-78; 2 Toullier, n. 924; 1 Biret, *Code Civil*, 104; 2 Pand. Franç., p. 80; 2 Marcadé, 43; C. L., 217; C. N., 331. [I. 313.]

238. Such legitimation takes place even in favor of the deceased children who have left legitimate issue, and in that case it benefits such issue.—*Instit.*, lib. 3, tit. 1, § 2, *de hæreditatibus quæ*; Pothier, *Mariage*, n. 413; *Ibid.*, *Successions*, ch. 1, sec. 2, art. 3, § 5, quest. 4, p. 23; 2 Pand. Franç., 87; 4 *Ibid.*, 223-4; 2 Toullier, nn. 931 et seq.; C. L. 218; C. N., 332. [I. 313.]

239. Children legitimated by a subsequent marriage have the same rights as if they were born of such marriage.—Pothier, *Mariage*, n. 421; *Ibid.*, *Successions*, c. 1, sec. 2, art. 3, § 5, quest. 4, Lebrun *Successions*, nn. 16, 17, p. 24; 2 Toullier, n; 929; 2 Marcadé, p. 48; 4 Pand. Franç., 225, 228; C. L., 219; C. N., 333. [I. 313.]

240. The forced or voluntary acknowledgement by the father or mother of their illegitimate child, gives the latter the right to demand maintenance from each of them, according to circumstances.—Lacombe, vo. *Bâtard*, sec. 3, no. 6; Guyot, Rép., vo. *Aliments*, 318; 2 Boileux, 122; 2 Pand. Franç., 229. [I. 313.]

DECISIONS:—1. Durant la première enfance, l'enfant naturel est laissé sous les soins et en la possession de la mère; mais après les premières années, le père doit avoir l'alternative de prendre son enfant avec lui ou de continuer à en payer l'entretien à la mère.—Q. B.—*Dubois & Hébert*, 17 L. C. J., p. 290.

2. In an action of seduction, the *frais d'entretien* can only be legally recovered from the date of service of process, and not from the birth of the child.—Q. B.—*Coupal & Bonneau*, 10 L. C. J., p. 177.

Digitized by Google

3. The mother of an illegitimate child (though she has not been named tutrix) has an action against the father for the support of the child.—C. R.—*Bilodeau vs Tremblay*, 3 R. L., p. 445.

4. Que l'enfant naturel reconnu de ses parents, quand même il serait parvenu à l'âge de pourvoir lui-même à sa subsistance, peut réclamer d'eux des aliments, lorsqu'il est dans un état de dénument actuel, causé soit par infirmité, manque d'ouvrage ou autre raison de même genre.—Q. B.—*Clément & Francis*, 4 Q. B. R., p. 13, 6 L. N., p. 194.

5. Que dans notre droit, l'autorité du père et de la mère de l'enfant naturel est absolument égale; que lorsqu'ils ne s'entendent pas sur sa garde, les tribunaux, qui exercent sur ce rapport, une autorité discrétionnaire absolue, peuvent la donner à celui des deux dont la conduite antérieure fait espérer de meilleurs soins.—C. R.—*Côté vs Denault*, 10 Q. L. R., p. 115.

6. The defendant, the father of an illegitimate child, was condemned to pay for the child's maintenance until she attained the age of sixteen, at the rate of $72 yearly until she attained the age of seven, then the sum of $96 yearly until she attained the age of fourteen years and lastly the sum of $144 from that age to that of sixteen years, reserving *à qui de droit* the right to sue for an alimentary allowance after she attained that age should there be need thereof.—WURTELE, J.—*Cameron vs Steele*, 11 L. N., p. 234.

241. An illegitimate child has a right to establish judicially his claim of paternity or maternity, and the proof thereof is made by writings or testimony, under the conditions and restrictions set forth in articles 232, 233, 234.—Fournel, *Séduction*, 129 et seq.; Merlin, Rép., vo. *Filiation*, n. 2; 2 Toullier, nos. 937, 967; 1 Gin. pp. 197 et seq.; C. N., 340, 341. [I. 315.]

DECISIONS:—1. In an action *en déclaration de paternité*, where the defendant admitted the connection with the mother, but assigned a date which would disprove his paternity of the child, and there was no evidence of improper conduct of the mother otherwise, the Court will give weight to her evidence that the defendant was the father. Absolute certainty in such cases is not required: it is sufficient to establish a strong probability that the defendant is father.—JOHNSON, J.—*Denault vs Banville*, 7 L. N., p. 149.

2. Que, dans la recherche de la paternité par l'enfant naturel, la preuve testimoniale ne peut être admise que lorsqu'il y a un commencement de preuve par écrit ou des présomptions ou indices résultant des faits *constatés avant l'enquête*, assez graves pour en déterminer l'admission.—C. R.—*Turcotte vs Nacké*, 7 Q. L. R., p. 196.

3. The plaintiff was named tutor *ad hoc* to a natural child, upon advice of family council, duly homologated, and in this quality sues defendant *en déclaration de paternité*. Defendant pleads that a tutor alone and not a tutor *ad hoc*, has power to bring this action. *Held:* That the appointment being *chose jugée*, and the defendant not having applied for revision of judgment, the plea must be overruled.—LORANGER, J.—*Auger vs Dionne*, 13 R. L., p. 332.

4. An action *en déclaration de paternité* may be maintained where it is proved that the defendant had connection with the mother at the time, although

Digitized by Google

it also appears that others were guilty with him.—C. R.—*Lizotte vs Descheneau*, 6 L. N., p. 170.

5. Que la preuve de paternité d'un enfant naturel ne peut se faire que par écrit, ou par témoin, lorsqu'il y a commencement de preuve par écrit, ou lorsque les présomptions ou indices, résultant de faits constants, sont assez graves pour en déterminer l'admission.—C. R.—*Miller vs Lepitre*, 15 R. L., p. 254.

TITLE EIGHTH.

OF PATERNAL AUTHORITY.

242. A child whatever may be his age, owes honor and respect to his father and mother.—*ff* L. 9, *de obsequiis*; *ff* L. 6, *de in jus vocando*; Novelle 12, c. 2; Pothier, *Mariage*, no. 389; *Des personnes*, p. 604; 3 Domat, p. 16; 4 Pand. Franç., 317; Pocquet, *Puiss. pat.* 30; 1 Gin. 220; C. L., 233; C. N., 371. [I. 315.]

243. He remains subject to their authority until his majority or his emancipation, but the father alone exercises this authority during marriage; saving the provisions contained in the act 25 Vict., chap. 66.—*ff* lib. 50, tit. 16, L. 196; *Institut., lib.* 1, tit. 2, 12; Pothier, *Mariage*, nos. 389, 399; *Personnes*, pp. 604-5; *Int. aux cout.*, tit. 9, no. 2; Arrêtés de Lamoignon, tit. 2, art. 1 et seq.; 2 Toullier, nos. 1041-6-9, 1176; 2 Pand. Franç., 305; 4 Pand. Franç., 324, 327 et seq.; C. L., 234; C. N., 372, 373. [I. 315.]

Amendments: See those noted at C. C., 177.

DECISIONS:—1. A minor aged upwards of 16 years, has a right to choose the person with whom she will reside.—Q. B.—Monk, J.—*Cooper & Tanner*, 8 L. C. J., p. 113.

2. A father is by law entitled to the possession, custody and guardianship, and cannot be deprived of his minor child, except for insanity or gross misconduct; nor can he deprive himself of his paternal right, and any contract to the contrary cannot bind him, as it is immoral in the eye of the law.—Q. B.—*Barlow & Kennedy*, 17 L. C. J., p. 253.

3. The object of *habeas corpus* is to see that no person is deprived of his liberty illegally or against his will, and not to determine the respective rights of parties over one another and it cannot, therefore, be used by a father to enforce his right to have the custody of his child. Where a minor child is brought before the judge under *habeas corpus*, her own statement, if of sufficient age to judge for

Digitized by Google

herself, will be taken as to whether she is under restraint or not.—***Stoppellbein & Hull***, 2 Q. L. R., p. 255.

4. As a general rule, where a minor is brought up before the court by ***habeas corpus***, if he be of an age to exercise a choice, the court leaves him to elect as to the custody in which he will be.—Semble: The above rule would not apply in the case of a girl, under 16, leaving the house of her father, mother or other person having lawful charge of her. Nor in the case of a refractory child, under 14, liable to be sent to an industrial school under the 32 Vict., c. 17.—C. R.—***Regina vs Hull***, 3 Q. L. R., p. 136.

5. Que, dans notre droit, l'autorité du père et de la mère de l'enfant naturel est absolument égale; que lorsqu'ils ne s'entendent pas sur sa garde, les tribunaux, qui exercent sur ce rapport une autorité discrétionnaire absolue, peuvent le donner à celui des deux dont la conduite antérieure fait espérer de meilleurs soins.—C. R.—***Coté vs Denault***, 10 Q. L. R., p. 115.

244. An unemancipated minor cannot leave his father's house without his permission.—Pothier, *Personnes*, tit. 6, s. 2; Merlin, Rép. vo. *Puis. patern.*, s. 3, § 6; 2 Toullier, nos. 1046-7; Pocquet, p. 32; 4 Pand. Franç., 328; C. L., 236, C. N., 374. [I. 315.]

DECISION: Under the circumstances stated, the persons brought up under the writ of ***habeas corpus*** being of the ages of fourteen and seventeen years respectively, the court would not exert any coercion on them.—MEREDITH & DORION, JJ.—***Rivard vs Goulet***, 1 Q. L. R., p. 174.

245. The father and, in his default, the mother of an unemancipated minor have over him a right of reasonable and moderate correction, which may be delegated to and exercised by those to whom his education has been entrusted.—Pothier, *Personnes*, 605; Pocquet, 32; 5 Journal des Aud., liv. 12, c. 25; *Canadian Abstract* (Doucet), 85; Arrêtés de Lamoignon, tit. 3, art. 18; Cugnet, 121; Pothier, *Garde*, 371; Nouv. Deniz. vo. *Garde*, 183, 201; 2 Toullier, 1050; Fenet-Pothier, 85; 1 Gin. 224, 227, 242; 4 Pand. Franç., 350 et seq., 357-8; C. L., 236. [I. 315.]

DECISIONS:—1. Le droit de correction accordé à l'instituteur, ne doit être exercé que dans le cas de nécessité, et seulement au degré proportionné à l'offense et aux circonstances, et l'instituteur est passible de dommages-intérêts s'il excède ces bornes.—LORANGER, J.—***Brisson vs Lafontaine***, 14 L. C. R., p. 377.

2. Schoolmasters have a right of moderate chastisement against disobedient and refractory scholars, but it is a right which can only be exercised in cases necessitated for the maintenance of school discipline, the interest of education and to a degree proportioned to offence committed, and any chastisement exceeding this limit, and springing from motives of caprice, anger, or bad temper, constitutes an offence punishable like ordinary ***delicts***.—LORANGER, J.—***Brisson vs Lafontaine***, 8 L. C. J., p. 173.

Digitized by Google

TITLE NINTH.

OF MINORITY, TUTORSHIP AND EMANCIPATION.

CHAPTER FIRST.

OF MINORITY.

246. Persons of either sex remain in minority until they attain the full age of twenty-one years.—C. S. L. C., c. 34, s. 1; 4 Pand. Franç., 474; 10 Fenet, 544 et seq.; C. N. 388. [I. 315.]

247. Emancipation only modifies the condition of the minor; it does not put an end to the minority, nor does it confer all the rights resulting from majority.—Guyot, Rép. vo. *Emancipation*, pp. 659, 660. [I. 315.]

248. The disabilities, rights and privileges resulting from minority, the acts the minor may do and the suits he may bring, the cases in which he may demand to be relieved, the manner and time of making the demand, and other like questions, are determined in the third book of the present code, and in the Code of Civil Procedure.—C. C. P., arts. 1193, 1267, 1320. [I. 315.]

CHAPTER SECOND.

OF TUTORSHIP.

SECTION I.—OF THE APPOINTMENT OF TUTORS.

249. All tutorships are dative; they are conferred on the advice of a family council, by a competent court or by any judge of such court, having civil jurisdiction in the district where the minor has his domicile, or by the prothonotary of such court.—Pothier, *Intr. aux*

Digitized by Google

Cout., liv. 1, tit. 9, art. 183 ; Meslé, *Minorité*, 8, 77, 85. 86, 133 ; 1 Bourjon, 47 ; Guyot, Rép., vo. *Tutelle*, 313 ; Lamoignon, *Tutelles*, p. 8 ; Pothier, *Personnes*, p. 610 ; Lacombe, vo. *Tutelle*, s. 4, nos. 1, 2, p. 774 ; 2 Pigeau, 303 ; 1 Pigeau, 71 ; 34 Geo. III, c. 6, s. 9 ; 12 Vict., c. 38, s. 74 ; 14-15 Vict., c. 58 ; 16 Vict., c. 91 ; 18 Vict., c. 17 ; C. S. L. C., c. 86 ; 1 Maleville, 360 ; 4 Pand. Franç., 392, 509 ; Mercier, *De tutelis*, 5 ; Décl., 15 déc. 1721 ; Décl., 1 oct. 1741 ; C. S. L. C., c. 78 s. 23. [I. 317.]

DÉCISIONS :—1. Un père ne peut porter une action pour son fils mineur comme son tuteur naturel, ni maintenir sa propre action, s'il l'a jointe à celle portée pour son fils en telle qualité.—DUVAL, J.—*Petit vs Béchette*, 2 L. C. R., p. 367.

2. Dans le Bas-Canada, la tutelle est dative, et conférée par le juge, et non par l'avis de parents, qui n'est qu'un mode d'enquête pour aider le juge dans l'exercice de cette attribution. Une tutelle n'est pas nulle de plein droit à raison de ce qu'un des aïeux des mineurs n'a pas été appelé à l'assemblée de parents, et elle ne doit pas être mise de côté, si l'intérêt des mineurs n'est pas affecté par suite de cette omission. La tutelle doit être déferée par le juge du dernier domicile du père décédé, lequel domicile reste celui des mineurs. Dans le cas de deux tutelles en deux juridictions différentes, le tribunal appelé à prononcer sur celle qui a eu lieu dans sa juridiction, peut et doit également prononcer sur la validité de l'autre, si elle est mise en question.—Q. B.—*Beaudet & Dunn*, 5 L. C. R., p. 344.

3. Le père ne peut pas faire une opposition comme tuteur légitime de ses enfants.—C. R.—*Fletcher vs Gatignan*, 1 L. C. J., p. 100.

4. A judge in the district of Montreal has no jurisdiction to take cognizance of an *avis* of relations taken in the district of Iberville, for the election of a tutor and sub-tutor to minors whose domicile is at Montreal. The election must take place at Montreal.—TORRANCE, J.—*Ex parte, Marcel Gauthier*, 17 L. C. J., p. 17.

5. The mother of a natural child cannot, without being first named tutrix to the child institute an action against a defendant asking that he be declared to have the civil status of father to the child ; she must either be appointed tutrix to the child or be joined in her action by a tutor *ad hoc*.—JOHNSON, J.—*Giroux vs Herbert*, 5 R. L., p. 439.

6. Des mineurs qui n'ont jamais résidé dans la province de Québec, ni avant ni lors de la nomination du tuteur, peuvent cependant y être pourvus d'un tuteur en la manière ordinaire.—Q. B.—*Brooke & Bloomfield*, 6 R. L. p. 533.

2. Que dans certains cas spéciaux la femme, même du vivant de son mari, peut être nommée tutrice à son enfant mineur.—MATHIEU, J.—*Ex parte, Dame M. Delisle*, 7 L. N., p. 120.

3. The tutorship of a widow to her minor children, ceases on her second marriage. (C. C. 2168).—RAMSAY, J.—*Ex parte, Grace Ham*, 6 L. L. N., p. 115.

See also cases noted at C. C. 290, 304.

250. The convocation of a family council may be demanded by all those related or allied to the minor, without regard to the degree

Digitized by Google

of relationship, by the subrogate-tutor, by the minor himself in certain cases, by his creditors, and by all other persons interested.—Arrêtés de Lamoignon, tit. 4, art. 3, p. 8; Pothier, *Intr. aux Cout.*, tit. 9, § 3, p. 269; *Ibid., Personnes*, tit. 6, sec. 4, § 2, p. 610; 2 Pigeau, 301-3; Meslé, 89; 17 Guyot, Rép., 316; 2 Boileux, 336; 7 Demolombe, nos. 281, 282; C. N., 406. [I. 317.]

251. The persons to be called to a family council are those most nearly related or allied to the minor, to the number of seven at least, and taken, as equally as possible, from both the paternal and the maternal line.—*ff* L. 2, *Qui petant tutores*; Arrêtés de Lamoignon, tit. 4, art. 4, p. 8; Raveau, 5; Pothier, *Intr. aux Cout.*, tit. 9, n. 11; *Ibid., Personnes*, tit. 6, sec. 4, art. 1, § 2; 2 Pigeau, 303; Meslé, 91; 17 Guyot, p. 317; C. N., 407. [I. 317.]

DECISIONS:—1. Que la composition d'un conseil de famille en partie par des amis, lorsqu'il y a suffisant de parents, et la nomination d'un tuteur étranger ne sont pas des causes de nullité absolue, mais seulement relative, et ne peuvent être invoqués utilement que lorsque la chose a été faite frauduleusement et au préjudice des droits des mineurs.

Que des mineurs devenue majeurs ne peuvent se plaindre de l'administration de leur tuteur, lorsque depuis leur majorité ils ont accepté son compte, lui ont donné une décharge, et ont fait actes d'héritiers.—LORANGER, J.—*Banque Jacques-Cartier vs Pinsonnault*, M. L. R., 1 S. C., p. 18.

2. Que dans un conseil de famille composé d'amis, le défaut d'y avoir invoqué tous les parents et alliés résidant dans le district, n'entraîne pas la nullité des actes de l'assemblée, si d'ailleurs les parents n'y ont pas été systématiquement exclus et si cela ne cause aucun préjudice aux mineurs.—TASCHEREAU, J.—*Caty vs Perreault*, M. L. R., 1 S. C., p. 131.—Q. B.—16 R L., p. 148.

252. With the exception of the mother and other female ascendants during widowhood, the relations must be males, of the full age of twenty-one years, and residing in the district where the appointment of a tutor is to be made.—Lamoignon. *Arrêtés*, tit. 4, art. 4, p. 8; 2 Pigeau, 303; 4 Pand. Franç., 513. [I. 317.]

253. If, however, a sufficient number be not found in the district, they may be taken in other districts, and even in default of relations of both lines, the friends of the minor may be called to form or to complete the number required.—Arrêtés de Lamoignon, tit. 4, art. 4; Pothier, *Personnes*, 610; 2 Pigeau, 303; 17 Guyot, 318; 2 Boileux, 351; C. N,, 409. [I. 317.]

254. Persons related or allied to the minor, qualified to make part of the family council, and who have not been called, have a

Digitized by Google

right to attend, and to give their advice as if they had been called.—2 Pigeau, 303. [I. 319.]

255. The judge or prothonotary, on petition of a competent person, calls before him the relations, connections, or friends of the minor who are to compose the family council, and for this purpose, grants an order which is notified to the parties at the instance of the person seeking the convocation.—C. S. L. C., c. 86, ss. 2, 10; c. 78, s. 23. [I. 319.]

256. If the persons to be called reside at a greater distance than five leagues, the court, judge or prothonotary may, if requested, authorize a notary or other competent person to hold such family council at the place where such parties reside, to administer the necessary oath, to take their advice on the appointments to be made, and even to administer the oath of office to the tutor chosen.—C. S. L. C., c. 78, s. 23; c. 86, ss. 2, 3. [I. 319.]

257. In every case in which, according to the preceding articles, a judge may call before him, or delegate the right to call a family council, it is lawful for any notary, residing or present at the place where the meeting is to be held, without regard to distance, to call it himself without the authorization of the judge, and to act therein in the same manner in every respect as if he had been delegated by the judge.—C. S. L. C., c. 86, ss. 5, 9. [I. 319.]

258. The notary can, however, act in conformity with the preceding article, only when he is requested to do so by one of those at whose instance such council might have been called before a judge; and in such case, the petitioner makes a declaration before the notary, of the object and motives of his demand, in the same manner as if it were addressed to a judge. Of this declaration the notary must draw up an act in writing.—C. S. L. C., c. 86, s. 6. [I. 319.]

259. Family councils thus called by notaries, are composed in the same manner as those called before a judge. It is only in default of persons related or allied to the minor, that his friends are admitted, and this default must be verified by the notary, and mentioned in his report.—C. S. L. C., c. 86, s, 7. [I. 319.]

260. The declaration required by article 258 is first read to the family council; the notary takes their advice and draws up an act in

Digitized by Google

writing of their deliberation, which act must mention the oppositions that were made, and the different opinions which were given, as also the quality, place of residence, and degree of relationship of those who composed the meeting.—C. S. L. C., c. 86, ss. 7, 8. [I. 319.]

261. In all cases where a family council is called and held by a notary, whether delegated by a judge or prothonotary or not, such notary is bound to make a complete and circumstantial report of his proceedings to the proper court or judge, or prothonotary, accompanied with the acts and declarations that it is his duty to draw up.—C. S. L. C., c. 86, ss. 2, 7, 9; c. 78, s. 23. [I. 321.]

262. The court, judge or prothonotary receiving this report, may homologate or reject the proceedings therein contained, which, without homologation, produce no effect. They may likewise make any order relative to such proceedings that they deem advisable, in the same manner as if the family council had been called before them.—[I. 321.]

263. In all cases where a tutor has been appointed out of court, the court may, on the petition of any one entitled to have a meeting of the family council called, and after having heard the tutor, cancel his appointment and order a new one.—2 Pigeau, 307-8; C. S. L. C., c. 86, s. 4. [I. 321.]

264. One tutor only is named to each minor, unless he has immoveable property in places remote from one another, or in different districts, in which cases a tutor may be appointed for each place or district wherein such immoveable property is situated. These tutors are independant of one another; each of them is only liable for that portion of the property which he has administered.

The tutor of the domicile of the minor has the care of his person.

Nevertheless, in certain cases, a separate tutor may be appointed to the person of the minor.

The mother or other female ascendant, who has remarried, may also be appointed joint-tutor with her second husband.—Arrêtés de Lamoignon, tit 4, arts. 15-16; Pothier, *Int. aux Cout.*, tit. 9, n. 12; Meslé, 98; 4 Pand. Franç., 462; C. N., 417. [I. 321.]

DECISIONS:—1. Tant qu'une première tutelle existe, une seconde ne peut avoir lieu, et tous les actes faits par un second tuteur sont nuls.—C. R.—***Motz vs Moreau***, 5 L. C. R., p. 433.

2. D. was appointed tutor to the minor children of his son deceased, the

Digitized by Google

mother also being dead ; subsequently, the maternal grand-father was appointed tutor by a judge in another district. *Held*, that the appointment of second tutor is invalid, the first appointment being still in force, and that the court sitting in Montreal cannot revise the appointment of a tutor in the district of Three Rivers. That the appointment of a tutor dates from the *avis de parents* and not from the homologation by the judge.—DAY, J.—*Dunn vs Beaudet*, M. C. R., p. 18.

3. Le décès de la femme qui ayant enfants a convolé en secondes noces, et avec laquelle son second mari survivant, avait été élu en justice tutor conjoint à tels enfants, entraîne la déchéance de la tutelle conjointe, ou co-tutelle du mari lui survivant.—C. R.—*Breault vs Barbeau*, 17 L. C. J. p. 48.

265. A tutor acts and administers, as such, from the time of his appointment, if it take place in his presence, otherwise from the time of his being notified of it.—*ff*, L. 1, § 1, *De adminis. et periculo tutorum ;* Pothier, *Int. aux Cout.*, tit. 9, n. 13 ; Arrêtés de Lamoignon, tit. 4, arts. 56-7-8-9 ; C. L., 297 ; C. N., 418. [I. 321.]

266. Tutorship is a personal office which does not pass to the heirs of the tutor. They are simply responsible for his administration. If they be of age, they are bound to continue such administration until a new tutor is appointed.—1 Bourjon, p. 70 ; Meslé, p. 221 ; C. N., 419. [I. 321.]

SECTION II.—OF SUBROGATE-TUTORS.

267. In every tutorship there must be a subrogate-tutor, whose appointment is made by the same act, and in the same manner, and is subject to the same revision as that of the tutor. His duties consist in causing the act of tutorship to be registered, being present at the inventory, watching over the administration of the tutor, causing his removal if there be ground for it, and in acting for the interests of the minor whenever they are opposed to those of the tutor.—Cout. de Paris, art. 240 ; Pothier, *Personnes*, 626-7 ; Arrêtés de Lamoignon, tit. 4, art. 11 ; Meslé, 103, 170 ; 4 Anc. Denizart, 576 ; 1 Maleville, 383 ; 4 Pand. Franç., 522 ; 2 Toullier, nn. 1128 et seq. ; C. L., 300, 301 ; C. N., 420, 422 ; C. S. L. C., c. 37, s. 31. [I. 323.]

268. The subrogate-tutor does not of right replace the tutor, when the tutorship becomes vacant, or when the tutor becomes incapable of acting by absence or any other cause, but in these cases it is his duty to have a new tutor appointed, and in default of so doing, he is liable to pay the damages which may result to the minor from his neglect.—Meslé, 653 ; C. N., 424. [I. 323.]

Digitized by Google

269. If during the tutorship a minor happen to have any interests to discuss judicially with his tutor, he is for such case given a tutor *ad hoc* whose powers extend only to the matters to be so discussed.—2 Lange, 148; 1 Pigeau, 71; Fenet Pothier, 95-6; Deniz, act. de notoriété, 473; 16 Merlin, vo. Subrogé Tuteur, p. 450. [I. 323.]

DECISIONS:—1. When a tutor *ad hoc* appointed to minors for the purpose of protecting their interests in a usufruct bequeathed to them, is sued in an action relating to the usufruct, it is not necessary that a tutor *ad hoc* be appointed expressly for the purpose of that suit.—C. R.—*Forsyth vs Williams*, 1 L. C. R., p. 102.

2. In an action by a widow for the division (*partage*) of the community, the minors, issue of the marriage, must be represented by a tutor *ad hoc* specially appointed to answer such demand *en partage*.—Q. B.—*McTavish & Pyke*, 3 L. C. R., p. 101.

3. Le mineur devenu majeur, appelé à reprendre l'instance du tuteur *ad hoc*, ne peut être condamné à la reprendre.—C. R.—*Corporation de St Norbert d'Arthabaska vs Champoux*, 1 Q. L. R., p. 376.

4. A tutor *ad hoc* cannot bring an action for breach of promise of marriage for a minor who has no tutor, and could he, he must first register the deed of tutorship.—TASCHEREAU, J.—*Brousseau vs Bédard*, 2 R. C., p. 112.

270. The functions of a subrogate-tutor cease in the same manner as those of a tutor.—4 Pand. Franç., 526; 2 Toullier, n. 1136; C. N., 425. [I. 323.]

271. The provisions contained in sections three and four of the present chapter, apply to subrogate-tutors.—C. N., 426. [I. 323.]

SECTION III.—OF THE CAUSES WHICH EXEMPT FROM TUTORSHIP.

272. No one is bound to accept a tutorship, unless he has been called to the family council which elected him.—Meslé, 268; Arrêt du 14 janvier 1641; 9 mars 1714; 2 Lapeyrère, 515; Pothier, *Personnes*, 610; 1 Malleville, 382; 4 Pand. Franç., 549, 550. [I. 323.]

273. He who is neither related nor allied to the minor cannot be compelled to accept the tutorship, if any one who is related or allied be in a position to take charge of it.—Serres, *Institutes*, liv. 1, tit. 25, § 10; Pothier, *Personnes*, 610; 1 Bousquet, 526; 4 Pand. Franç., 536; C. N., 432. [I. 323.]

274. Any person of the age of seventy years complete may refuse to be appointed tutor. He who has been appointed before he

Digitized by Google

was of that age, may be discharged when he has attained it.—*Cod. L. unica, qui ætate se excusant*; *Instit.*, lib. 1, tit. 25, § 13; 1 Argou, 53; Lacombe, vo. *Tuteur*, 778; Arrêtés de Lamoignon, tit. 4, art. 37; 4 Pand. Franç., 537; 6 Locré, *Esprit du code*, 163-4; C. N., 433. [I. 323.]

DECISION:—Que l'âge peut être une raison pour refuser la tutelle d'un mineur, mais n'est pas une cause d'exclusion.— JETTÉ, J.—*Lebœuf vs Daoust*, M. L. R., 1 S. C., p. 227.

275. Persons laboring under serious and habitual infirmity are exempt from being tutors; they may even obtain their discharge if such infirmity supervene after their appointment.—*Cod., L. unica, qui morbo se excusant; ff.* L. 11, 40, *de excus. tutorum;* Pothier, *Personnes*, p. 612; *Ibid., Int.* tit. 9, *Cout. d'Orl.*, n. 14; 1 Argou, 53; Arrêtés de Lamoignon, tit. 4, art. 37; 4 Pand. Franç., 539; C. L., 317; C. N., 434. [I. 323.]

276. [Two] tutorships are, for any person, a sufficient reason for refusing to accept a third, other than that of his children. A husband or father, who is already charged with one tutorship, is not bound to accept a second, unless it is that of his own children.—*ff.* L. 2, L. 3, *de excus. tutorum;* Arrêtés de Lamoignon, tit. 4, art. 48, p. 16; Pothier, *Int.* tit. 9, *Cout. d'Orl.*, n. 14; *Ibid, Personnes*, p. 612; Lacombe, vo. *Tuteur*, 778; C. N., 435. [I. 325.]

277. Those who have five legitimate children are exempted from any tutorship but that of their own children. Children who have died leaving issue still living, are counted in this number.—Pothier, *Int.* tit. 9, *Cout. d'Orl.*, n. 14; *Ibid., Personnes*, 612; 1 Bousquet, 530; Arrêtés de Lamoignon, tit. 4, art. 44-5-6; 6 Locré, *Esprit du code*, 174; 4 Pand. Franç., 544-5; C. N., 436. [I. 325.]

278. The birth of children during tutorship does not authorize its abandonment.—Pothier, loc. cit.; Arrêtés de Lamoignon, tit. 4, art. 46, 53; 1 Bousquet, 532; C. N., 437. [I. 325.]

279. If the person who has been elected by a family council be present, he is bound, under pain of forfeiting his grounds of exemption, to state them, in order that their validity may be determined at once, when the proceeding takes place before a court, judge or prothonotary, or in order that they may be reported to the court, judge or prothonotary by the notary or person delegated, if it be before either of these that the family council has been called.—Lamoignon, tit. 4,

Digitized by Google

art. 56; Ferrière, *Tutelles*, 123; Meslé, 269; C. N., 438, 439; C. S. L. C., c. 78, s. 23. [I. 325.]

280. If the person elected be not present, a copy of the act of election is served upon him, and he is bound, within five days, and under pain of forfeiting his grounds of exemption, to lodge them in the office of the court before which, or before the judge or prothonotary of which the proceedings were had, or in the hands of the notary or party delegated, if it be before either of these that the family council was called, in order that the matter may be dealt with in conformity with the preceding article.—Arrêtés de Lamoignon, tit. 4, art. 56; C. S. L. C., c. 78, s. 23. [I. 325.]

281. The decision given as to the validity of such grounds by the judge or the prothonotary, out of court, is subject to revision by the court whose judgment may also be appealed from; but during the litigation, the person elected is obliged to administer provisionally; and all his acts of administration are valid, even if he be afterwards discharged from the tutorship. — Arts. 263 & 265 of this title; Lamoignon. 58, 59; C. S. L. C., c. 86, s. 4; *Ibid.*, c. 78, s. 23; C. N., 440. [I. 325 to 327.]

SECTION IV.—OF INCAPACITY, EXCLUSION AND REMOVAL FROM TUTORSHIP.

282. The following persons cannot be tutors:

1. Minors, except the father who is bound to accept the office, and the mother, who although a minor, has a right to the tutorship of her children, but is not bound to accept it.—Arrêtés de Lamoignon, tit. 4, art. 23-4-5-7; Anc. Denizart, vo. *Tutelle*, 769; Meslé, 247; C. N., 442, § 1. [I. 327.]

2. Interdicted persons.—Pothier, *Personnes*, 611; Anc. Denizart, vo. *Tutelle*, 769; Meslé, 245; Arrêtés de Lamoignon, art. 36; 4 Pand. Franç., 556; C. N., 442, § 2. [I. 327.]

3. Women, other than the mother and female ascendants, who are entitled, during their widowhood and in the case provided for in the last paragraph of article 264, to the tutorship of their children and grandchildren, but are not bound to accept it.—Pothier, *Personnes*, pp. 602, 611; Arrêtés de Lamoignon, art. 24-5-6; *Novel*, 111, c. 5; Ferrière, *Tutelles*, 56; Meslé, 245; Anc. Denizart, vo. *Tutelle*, 769; 2 Pigeau, 306; 4 Pand. Franç., 558; C. L. 442; C. N., 442. § 3. [I. 327.]

Digitized by Google

4. All those who themselves or whose father and mother have against the minor a suit at law involving his status, his fortune, or an important portion of it.—Arrêtés de Lamoignon, art. 42; Meslé, 252-3; 1 Bousquet, 537-8; 1 Maleville, 398-9; 4 Pand. Franç., 444-5, C. N., 442, § 4. [I. 327.]

DECISIONS:—1. The father of an interdicted person ought of right to be appointed his curator, in the absence of any grave objection to such appointment, even when the majority of the *conseil de famille* thinks otherwise; and insolvency is not of itself a legal objection to such appointment—Q. B.—*Dufaux & Robillard*, 20 L. C. J., p. 288.

2. Une tutelle *ad hoc* à un mineur dont le père vivant et idoïne eût pu être nommé tuteur, est nulle.—C. R.—*Corporation de St. Norbert d'Arthabaska vs Champoux*, I Q. L. R., p, 376.

3. The mother of a minor of twelve years of age, the father being dead, is entitled to the charge of her child, unless it appear that she is disqualified by misconduct, or is unable to provide for the child.—Ramsay, J.—*Ex parte, Grace Ham*, 6 L. N., p. 115.

4. Que dans certains cas spéciaux la femme, même du vivant de son mari, peut être nommée tutrice à son enfant mineur.—Mathieu, J.—*Ex parte Dame M. Delisle*, 7 L. N., p. 120.

5. The tutorship of a widow to her minor children, ceases on her second marriage. (C. C., 2168.)—Casault, J.—*Courteau vs Gauthier*, 10 L. N., p. 98.

6. Que l'âge peut être une raison pour refuser la tutelle d'un mineur (C. C. 274) mais n'est pas une cause d'exclusion. Que l'incapacité d'un homme, pour être une cause d'exclusion de tutelle, doit être telle qu'elle le rend inapte à conduire ses affaires et celles d'autrui.—Jetté, J.—*Lebœuf vs Daoust*, M. L. R., 1 S. C., p. 227.

7. Qu'un aubain ne peut être nommé tuteur ou curateur, et que, dans l'intérêt de l'interdit, il ne pourra se faire nommer à cette charge en se faisant pendant l'instance naturaliser sujet anglais, si son intention n'est que de demeurer temporairement dans le pays.—Loranger, J.—*Driscoll vs O'Rourke*, M. L. R., 1 S. C. p. 311.

283. Mothers and grandmothers who have been appointed to a tutorship during their widowhood, are deprived of it from the day on which they contract a second marriage; and if the minors have not been provided with another tutor prior to such marriage, the husbands of such mothers or grandmothers remain responsible for the administration of the property of the minors during the second marriage, even if there be no community.—Arrêtés de Lamoignon, tit. 4, arts. 29, 32; Meslé, 112, 114; Merlin, Rép., vo. *Tutelle*, s. 3, n. 3. [I. 328.]

DECISION:—Le mari, élu en justice, tuteur conjoint avec sa femme, veuve en premières noces, aux enfants de cette dernière, ne peut pas représenter ces enfants dans un partage, après la mort de leur mère, dans lequel il est lui-même personnellement intéressé. *Semble*, que le décès de la mère des mineurs entraîne la déchéance d'une telle tutelle.—C. R.—*Brault vs Barbeau*, 3 R. L., p. 384.

Digitized by Google

284. Condemnation to an infamous punishment carries with it by law exclusion from tutorship; it also entails removal from a tutorship previously conferred.—Lamoignon, art. 36; Meslé, 236-7; Serres, *Instituts*, 86; Laroche, liv. 4, tit. 9, art. 4; 1 Bousquet, 539; 4 Pand. Franç., 559; C. N., 443. [I. 327.]

DECISION:—Que la déconfiture et l'insolvabilité ne sont pas des motifs de *destitution de tutelle* et qu'il faut des raisons très graves pour autoriser un tribunal à destituer un père de la tutelle de ses enfants.—TASCHEREAU, J.—*Charbonneau vs Charbonneau*, M. L. R., 2 S. C., p. 121.

For cases showing sufficient cause for the removal of an executor, see C. C. 917.

285. The following persons are also excluded from tutorship, and even may be deprived of it when they have entered upon its duties:

1. Persons whose misconduct is notorious;

2. Those whose administration exhibits their incapacity or dishonesty.—*ff* L. 5, L. 8, *de suspectis*; Pothier, *Personnes*, 621; Meslé, 226-8; 1 Bousquet, 539 et seq.; 4 Pand. Franç., 560; C. N., 444. [I. 329.]

DECISION:—A *tutelle* will not be set aside, on the petition of the mother of minors, upon the ground that the tutor appointed is not a relation, if it appear that the mother, from her habits and character, is totally unfit to be appointed tutrix herself, and that there is no objection to the fitness of the tutor appointed, and that there has been no irregularity in the proceedings for his appointment and that there are no other relatives of the minors within the jurisdiction of the court except the mother.—BADGLEY, J.—*Mitchell vs Brown*, 3 L. C., J., p. 111.

286. Actions for the removal of tutors may be brought before the court, by any one related or allied to the minor, by the subrogate-tutor, or by any other person having an interest in such removal.—Lamoignon, art. 115; Meslé, 229; 12 Vict., c. 38, § 14; 1 Bousquet, 542-3-6; 4 Pand. Franç., 563; C. N., 446, 448. [I. 329.]

DECISIONS:—1. A stranger has no legal *qualité* to bring an action *en destitution de tutelle*.—C. R.—*O'Meara vs McCleverty*, 1 L. C. J., p. 195.

2. A person not of kin or a relative to the minor has a right to present a petition *en destitution de tutelle*, when the minor has no kin or relative within Canada.—SMITH, J.—*Dooley vs Wardley*, 3 L. C. J., p. 72.

3. The proper mode of proceeding to destitute a tutor is by petition.—BADGLEY, J.—*Stephen vs Stephen*, 1 L. C. L. J., p. 98.

4. A tutor cannot be impleaded except by writ in the ordinary form.—TORRANCE, J.—*Ex parte Isidore Daoust & Lebœuf*, 7 L. N., p. 69.

5. Que lorsqu'un tuteur est absent, un autre tuteur peut être nommé, sur production d'affidavits constatant cette absence, et qu'il n'est pas nécessaire qu'il y ait poursuite pour faire déclarer l'absence.—MATHIEU, J.—*Ex parte, Noel Marcil* 12 R. L., p. 644.

Digitized by Google

287. The removal of a tutor can only be ordered upon the advice of a family council, which is composed in the same way as for his appointment, and is called in such manner as the court directs.—Lamoignon, art. 115 ; Meslé, 229 ; 1 Bousquet, 543 ; 4 Pand. Franç., 564-5. [I. 329.]

DECISION:—A tutor must be superseded in the manner directed by the statute 41 Geo. III, c. 7, s. 18, but an appeal is the proper remedy if the appointment of the tutor has not been regularly made. The action *en destitution* lies for subsequent misconduct in the tutor.—K. B.—*Darvault vs Fournier*, 3 R. de L., p. 365.

288. The judgment of removal must contain the grounds on which it is founded, and order the rendering of an account and the appointment of a new tutor, who is appointed with the usual formalities so soon as the judgment becomes executable either by acquiescence, by want of appeal in due time, or by its being confirmed in appeal.—C. S. L. C., c., 83, s. 39 ; C. N., 447. [I. 329.]

289. During the litigation, the tutor sued retains the management and administration of the person and of the property of the minor, unless the court orders otherwise.—Lamoignon, art. 116 ; 1 Bourjon, 70, n. 197 ; 1 Du Parc Poullain, 341 ; 2 Toullier, 355 ; 4 Pand. Franç., 564-6 ; 2 Boileux, 391 ; 1 Bousquet, 546 ; 2 Valette sur Proudhon. 350, note *a* ; 7 Demolombe, 301 ; 1 Maleville, 397. [I. 329.]

DECISION:—1. Que bien que l'action en destitution de tutelle n'enlève pas au tuteur l'administration des biens du mineur, il est de principe de ne pas lui laisser la disposition des capitaux tant que cette action est pendante.—JETTÉ, J.—*Lebœuf vs Grand Trunk Ry.*, M. L. R., 3 S. C., p. 272.

SECTION V.—OF THE ADMINISTRATION OF TUTORS.

290. A tutor has the care of the person of his pupil, and represents him in all civil acts.—Pothier, *Personnes*, pp. 614, 620 ; *Ibid., Droit de propriété*, nn. 7, 266 ; *Ibid., int. Cout. d'Orl.*, tit. 9, n. 15 ; 4 Anc. Deniz., vo. *Tutelle*, nn. 61-4 ; 1 Argou, 61 ; 1 Bousquet, 549. [I. 329.]

He is bound to manage his property like a prudent administrator, and is liable for the damages which may result from bad management.—Pothier, *Personnes*, 620 ; 4 Anc. Deniz., 772 ; 1 Bousquet, 550-1 ; Fenet Pothier, 103 ; 4 Pand. Franç., 565-6. [I. 329.]

He can neither buy the property of his pupil, nor take it on lease, nor accept the transfer of any right or any debt against his

Digitized by Google

pupil.—Pothier, *Personnes*, 620; Meslé, 153-4; 4 Anc. Deniz., 772-4; *Novel*, 72, c. 5; Lamoignon, tit. 4, art. 91, 96; 1 Bousquet, 553-4; Louet et Brodeau, *Lettre* T, n. 4; 6 Cochin, 528; C. N., 450. [I. 329.]

Amendment:—The act intituled "An act to consolidate and "amend the law to secure to wives and children the benefit of "assurances on the lives of their husbands and parents," modifies the last paragraph of this article by the following enactment.

It shall, nevertheless, be lawful, should the trustee or trustees, executor or executors, or tutor think fit, to advance the insurance money, or to dispose of the investments and advance the proceeds to any minor child during his or her minority, for the establishment, advancement or preferment in the world, or for the settlement in marriage of such child.—Q. 41-42 Vict., cap. 13, s. 22.

DECISIONS:—1. No action lies against a tutor personally upon a contract into which he entered solely on behalf of his pupil.—K. B.—*Turcotte vs Garneau*, 1 R. de L., p. 350.

2. If there is no special undertaking or personal covenant on the part of a tutor, when acting for his pupil, it is the minor who contracts by the ministry of the tutor; no action, therefore, can be maintained for damages against a tutor, for breach of a contract of marriage by him executed for and on the behalf of his pupil.—K. B.—*Turcotte vs Garneau*, 2 R. de L., p. 125.

3. No action of damages can be maintained against a tutor for a breach of his contract by which he engaged to marry his pupil to the plaintiff.—K. B.—*Chabot vs Morriset*, 2 R. de L., p. 206.

4. A minor cannot be impleaded in his own name for necessities for which he is liable; the action must be brought against the tutor.—Duval & Meredith, J. J.—*Cooper vs McDougal*, 4 L. C. R., p. 224.

5. Un inventaire fait sans y appeler le premier tuteur est nul.—Q. B.—*Moreau & Motz*, 7 L. C. R., 147.

6. Une action portée contre un défendeur mineur, lors de l'émanation du writ, mais majeur lors de sa signification, doit être renvoyée sur exception à la forme.—Mondelet, J.—*Chalifoux vs Thouin*, 2 L. C. J., p. 187.

7. Dans une action pour séduction intentée contre un fils mineur, en déclaration de paternite, et contre son père, tant en sa qualité de père qu'en celle de son tuteur naturel, le fils mineur n'est pas légalement représenté, et ne peut être appelé à tester en jugement et à répondre à l'action.—Q. B.—*Hislop & Emerick*, 9 L. C. R., p. 203.

8. By law the power of a tutor over the property of a minor does not extend beyond that of simple administration.—Q. B.—*Bank of Montreal & Simpson*, 10 L. C. R., p. 225. Privy Council.—14 Moore's P. C. Rep. p. 432, 11 L. C. R., p. 377.

9. The curator to a lunatic or insane person cannot remove him from his domicile to an hospital or asylum without the authority of the court, acting on the advice of his relations or friends.—Dorion, J.—*Ex parte, Cahill*, 18 L. C. J., p. 270.

10. The Plaintiff was named tutor *ad hoc* to a natural child, upon advice of family council, duly homologated, and in this quality sued defendant *en déclara-*

Digitized by Google

tion de paternité. Defendant pleads that a tutor alone and not a tutor *ad hoc* has power to bring this action. *Held.*—That the appointment being *chose jugée*, and the defendant not having applied for revision of judgment, the plea must be overruled.—LORANGER, J.—*Auger vs Dionne*, 13 R. L., p. 332.

11. Qu'une action en dommages-intérêts, pour séduction d'une fille mineure et en déclaration de paternité de l'enfant né du commerce charnel de cette fille avec le défendeur, et en réclamation d'une pension alimentaire, ne peut être portée par un tuteur *ad hoc*, sans l'assistance, des père et mère ou, à leur défaut, du tuteur ordinaire de la fille.—TASCHEREAU, J. — *Vallée vs Leroux*, 14 R. L., p. 553, 30 L. C. J., p. 271, M. L. R., 2 S. C., p. 196.

12. The persons in whose favour a property is substituted are entitled to intervene for the protection of their interests, in an action directed against a trustee administering the property under a marriage contract, to have him removed from the position of trustee and to compel him to account, and a tutor *ad hoc* may be appointed to represent substitutes, who are minors, for the purposes of making such intervention. The article 269 C. C. is not exclusive of all extension.—Q. B.—*Larue & Ratray*, 9 L. N., 356, 12 Q. L. R., p. 258, 14 R. L., p. 614.

13. La mère d'un enfant mineur, ne peut en cette qualité seule, instituer pour lui, comme sa tutrice maternelle, aucune action, sans être nommé sa tutrice.—MATHIEU, J.—*Wilhelmy vs Brisebois*, 27 L. C. J., p. 175, 6 L. N., p. 276, 12 R. L., p. 424.

14. A tutor has no right to carry on trade in the name of the minor, and a minor may be freed from all responsibility for such trading, by simply pleading the nullity thereof, without alleging or proving *lésion*.—PAPINEAU, J.—*Levin vs Traham*, 27 L. C. J., p. 213, 6 L. N. p. 242.

15. Que le père qui n'a pas été nommé tuteur à son enfant mineur, n'a pas le droit d'intenter pour lui une action pour gages, à moins qu'il n'ait lui-même loué les services de son enfant au défendeur. Que la reconnaissance de la dette par le défendeur au père ne peut valoir, parcequ'une telle reconnaissance ne peut faire revivre une dette qui n'a jamais été due au père.—CASAULT, J.—*Renaud vs Dussault*, 6 Q. L. R., p. 259, 4 L. N., p. 63.

16. Que le mineur n'a pas le libre exercice de ses droits pour ester en justice et qu'il ne peut être poursuivi en son nom, même pour des choses nécessaires.—CARON, J.—*Morgan vs LeBoutillier*, 5 Q. L. R., p. 212.

17. Qu'un tuteur ne peut être locataire des biens de son pupille.—Q. B.—*D'Orsonnens & Christin*, 30 L. C. J., p. 9, 4 Q. B. R., p. 253, 14 R. L., p. 253.

18. See also case of, Q. B.—*Terrien & Labonté*, 2 Q. B. R., p. 94, noted at C. C., 942, 1484.

19. The father cannot bring in his own name an action for damages arising from the seduction of his daughter, a minor.—Q. B.—*Taylor & Neill*, 13 Q. L. R., p. 195.

See also cases noted at C. C. 249 & 304.

291. A tutor as soon as his appointment is known to him, and before acting under it, must make oath to well and truly administer the tutorship.—*Cod.* L., 27, *De episcopis et cler.*; 1 Argou, 55-6; 4 Anc. Deniz., 772; Lamoignon, tit. 4, art. 57; Pothier, *Personnes*, 618; *Ibid.*,

Digitized by Google

Cout. d'Orl., Int. au tit. 9, n. 13 ; Ord., 1579 ; Papon, liv. 15, tit. 5, art. 4 ; 4 Pand. Franç., 565. [I. 331.]

292. As soon as he has taken the oath, the tutor demands the removal of seals, if they have been affixed, and proceeds forthwith to the taking of an inventory of the property of the minor, in presence of the subrogate-tutor.

If anything be due to him by the minor, the tutor must declare it in the inventory, on pain of forfeiting his claim.—Pothier, *Personnes*, 618 ; Lamoignon, arts. 60, 63, 65 ; Meslé, 122-3 ; 1 Argou, 56 ; Lacombe, vo. *Tuteur*, n. 4, p. 781 ; Domat, liv. 2, tit. 1, s. 3, n. 10 ; 1 Gin., 322 ; C. N., 451 ; *Novel.* 72, c. 4 ; Papon, liv. 15, tit. 5, n. 2 ; 1 Fréminville, *Tutelles*, n. 208 ; 4 Anc. Deniz., 772, n. 65 ; 2 Henrys, Lamoignon, tit. 4, art. 68 ; 1 Bousquet, 556 ; 1 Gin., 323 ; 2 Proudhon, 357-359 ; C. N., 451. [I. 331.]

DECISIONS :—1. Where a tutor did not mention that a note of $600 was due to him, he could not charge it in his account.—Q. B.—*Prince & Gagnon*, 2 Q. B. R., p. 74.

2. Que l'inventaire fait par le tuteur des biens dont il a la gestion est valable, bien que le tuteur ait omis d'en signer toutes les vocations, si cet inventaire a été régulièrement clos en justice.—Q. B.—*Grégoire & Grégoire*, 4 Q. B. R., p. 308, 30 L. C. J., p. 286, 12 Q. L. R., p. 32, M. L. R., 2 Q. B., p. 228.—SUPREME COURT.— 9 L. N., p. 410.

293. Within the month which follows the closing of the inventory, the tutor causes all the moveable effects, except those which he is allowed or bound to keep in kind, to be sold by public auction, in presence of the subrogate-tutor, and after due publications, which must be mentioned in the minute of sale.—*Cod.*, L. 22, L. 24, *De administratione tutorum ;* Ord., 1560, art. 102 ; Serres, 78 ; Lamoignon, tit. 4, art. 70 ; 4 Anc. Deniz., 772-3 ; 2 Henrys, liv. 4, quest. 112 ; Meslé, 136 ; 1 Gin., 323 ; 4 Pand. Franç., 574 ; C. N., 452. [I. 331.]

294. Within the six months which follow such sale, the tutor after discharging the debts and other liabilities, must invest whatever money remains in his hands, whether it proceeds from the sale, or is found upon making the inventory, or is subsequently received from the debtors of the minor.—1 Argou, 57 ; Lamoignon, art. 99 ; Pothier, *Personnes*, 619 ; 4 Anc. Deniz., 772 et seq. ; 1 Gin., 325. [I. 331.]

Amendments :—1. In this act the word " administrator " means and includes any institute in whatever degree under a substitution, howsoever created, and any executor under any will, and any tutor

Digitized by Google

or curator, having as such the possession or administration of property belonging to another, or held by him for the benefit of another, whether the will, instrument or *acte* constituting him such administrator have been made or have taken effect before or after the coming into force of this act.

2. Any administrator bound by law to invest moneys held by him as such administrator may invest the same in Dominion stock, and in the event of the said stock being paid off, he shall receive the principal and be bound to re-invest it in the same manner as he was bound to do before he invested it in Dominion stock.

3. Whenever the terms of the will, instrument or act constituting an administrator, give him power to invest moneys, and a full or restricted discretion as to the nature or manner of such investment, he shall be held to have the like power and discretion to change from time to time any such investment he may have made, by selling the property moveable or immoveable in which he had invested, and re-investing the proceeds as he might originally have done.—Q. 33 Vict., cap. 19.

1. Administrators, as defined by section one of the act 33 Vict., chap. 19, and including trustees to be exempt from liability by reason of the investments made by them, saving always the case of fraud in making the same, must invest moneys held by them as such, in dominion or provincial permanent stock or debentures, or in public securities of the United Kingdom or of the United States of America, or in real estate in this province, or on first privilege or hypothec upon real estate in this province valued in the municipal valuation roll at double the amount of the investment, except in the case of executors when they are authorized otherwise by the will, in the case of institutes and curators to a substitution when they are likewise otherwise authorized by the document creating the substitution, and in the case of trustees when they also are otherwise authorized by the document creating the trust.

2. When therefore investments are made otherwise than as above provided, or than as ordered by the will appointing executors, or by the document creating a substitution or a trust, the administrators are obliged to indemnify the parties to whom they are accountable for losses caused by the depreciation of the securities invested in, under pain of coercive imprisonment, subject to the provisions contained in the code of civil procedure.

3. In the case of fraud in making investments in the securities mentioned in section 1, administrators are responsible for the damage

Digitized by Google

caused by their fraud under the like pain of coercive imprisonment.—Q. 42-43 Vict., cap. 30.

Section 1 of the Act 42-43 Vict., chap. 30 is amended, by striking out, in the sixth line, the word: "permanent;" and by adding, after the word "debentures" in the sixth and seventh lines, the words: "or in municipal stock or debentures;" and by striking out, in the tenth and eleventh lines, the words "valued in the municipal valuation roll at double the amount of the investment," and by substituting in lieu thereof the words: "to an amount not exceeding three fifths of the municipal valuation of such real estate."—Q. 46 Vict., cap. 24, s. 2.

295. During the tutorship, he must likewise invest the excess of the revenues over the expenses, as well as all capital sums which have been reimbursed and all other moneys which he has received, or ought to have received; and this he must do within the same delay of six months from the day when he had or ought to have had a sufficient sum, considering the means and condition of the minor, to form a suitable investment.—*ff.* L. 15, *De administratione tutorum;* Lamoignon, art. 99, 100, 101, 102, 103, 104; 1 Argou, 58; Meslé, 164; Pothier, *Personnes*, 619, 620; 4 Anc. Deniz., 772 et seq.; 1 Gin., 326. [I. 351.]

DECISIONS:—1. The law allows a tutor or curator six months to find an investment of trust funds.—Q. B.—*Mackenzie & Taylor*, 9 L. C. J., p. 113.

2. Que le tuteur peut exercer une discrétion modérée dans l'emploi des deniers pupillaires et acheter à crédit un immeuble, surtout s'il est établi que telle acquisition ne constitue pas un acte de mauvaise administration.—C. R.—*Société de Construction Jacques-Cartier vs Désautels*, 14 R. L., p. 315; M. L. R., 2 S. C., p. 77.

296. In default of the tutor having made, within the delays, the investment required, he is bound to account to his pupil for interest on the sums which he ought to have so invested, unless he can establish that such investment was impossible, or unless, on his application, the judge or the prothonotary, upon the advice of a family council, has dispensed with the investment or prolonged the delays.—1 Argou, 57-8; Pothier, *Personnes*, 619, 620; Lamoignon, 99, 102; 4 Anc. Deniz., 773, nn. 66-7; Meslé, 161 et seq.; 2 Pigeau, 112; Le Prestre, cent 1, ch. 52; 1 Gin., 326; Dard., 96, note *a;* C. S. L. C., c. 78, s. 23. [I. 331.]

DECISION:—From the moment a tutor uses, for his own profit, the money coming into his hands, as tutor or curator, however soon that may be after his appointment, he is liable for interest thereon. Where a party deposited a trust

Digitized by Google

fund to his own credit, in a bank, and afterwards, from day to day, drew out those funds as if they were his own, by cheques signed by himself, and in his own name; it became incumbent upon him to show, if he could, that he had so drawn out the trust funds for the purposes of the trust, and, in default of his doing so, the conclusion is that he must have used the trust fund for his own purposes.—Q. B.—*Mackenzie & Taylor*, 9 L. C. J., p. 113.

297. Without the authorization of the judge, or the prothonotary, granted on the advice of a family council, the tutor is not allowed to borrow for the minor, nor to alienate or hypothecate his immoveable property ; nor is he allowed to make over or transfer any capital sums belonging to the minor, or his shares and interest in any financial, commercial, or manufacturing joint-stock company.—*Cod.*, L. 4, *de prædiis et aliis rebus ;* Ferrière, *Tutelles*, 226 et seq.; Meslé, 144 et seq.; 1 Argou, 60-1 ; Lamoignon, art. 87-8 ; Pothier, *Obligations*, n. 76 ; *Vente*, n. 14 ; *Personnes*, tit. 6, s. 4, art. 3, 4 ; *Cout. d'Orl., Int. au titre* 9, n, 16, *Int. au tit.* 15, n. 6 ; *Droit de propriété*, nn. 222-5 ; 1 Bousquet, 565 ; 4 Pand. Franç., 586 ; C. S. L. C., c. 78, s. 23 ; C. N., 457. [I. 333.]

Amendment:—Notwithstanding all the provisions of the civil code, and namely, the articles 297, 298, 343 and 953, it shall be lawful for all corporations, aggregate or sole, communities, institutes, tutors, curators, executors, administrators, and all other representatives or persons whatsoever, not only for themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether born or unborn, lunatics, idiots, femes-covert, or other person or persons who are or shall be seized, possessed of, or interested in any lands or grounds which the company may require for the purposes of the said road, to contract for, sell and convey to the said company all or any part of such lands so required by the company for such purposes, and all contracts, agreements, sales, conveyances, and assurances so to be made, shall be valid and effectual in law, to all intents and purposes whatsoever, any law, statute, usage or custom to the contrary thereof in any wise notwithstanding; and all such corporations or communities, or all persons whatsoever, so conveying as aforesaid, are hereby indemnified for what they, or any of them, shall respectively do, by virtue of or in pursuance of this act.—Q. 33 Vict., cap. 32, s. 42.

The Provincial Act intituled " An Act respecting Railways " containing somewhat similar powers, was itself repealed by the section of the Act hereinafter next cited.—Q. 33 Vict., cap. 51, s. 3.

3. All corporations and persons whatsoever, usufructuaries, institutes, guardians, curators, executors, administrators, and all other trustees whatsoever, not only for and on behalf of themselves, their

Digitized by Google

heirs and successors, but also for and on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes covert*, or other persons, seized, possessed of, or interested in any lands, may contract, sell and convey unto the company all or any part thereof; provided always that, in all cases in which the parties, above mentioned, shall have no legal right to sell and convey the ownership of the said lands, they shall, after having given due notice to the parties interested, obtain, from a judge of the Superior Court, permission to sell such lands; and the said judge shall give the necessary orders for the investment of the price thereof, in such manner as he shall deem expedient and in accordance with the laws of the Province to protect the rights of the owner of such land.—Q. 43-44 Vict., cap. 43, s. 9, s. s. 3.

The Dominion Act (31 Vict. cap. 68, s. 9, s. s. 3) intituled "An Act respecting Railways" containing somewhat similar provisions to the preceding enactment, was itself repealed by the Consolidated Railway Act, 1879 (D. 42 Vict., cap. 9, s. 9, s. s. 3) which now forms part of the Revised Statutes of Canada and reads as follows:

All tenants in tail, or for life, *grevés de substitution*, guardians, curators, executors, administrators, trustees and all persons whomsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes coverts*, or other persons, seized, possessed of or interested in any lands, may contract, sell and convey to the company all or any part thereof.

In all cases in which the persons hereinbefore enumerated have no right in law to sell or convey the rights of property of the said land, the said persons shall obtain from a judge, after due notice to the persons interested, the right to sell the said land; and the said judge shall give such orders as are necessary to secure the investment of the purchase money in such a manner as he deems necessary, in accordance with the law of the Province to secure the interests of the owner of the said land.—R. S. C., cap. 109, s. 8, s. s. 5 & 6.

DECISIONS:—1. A contract of sale executed by a tutor on the behalf of his pupil, without an *avis de parents*, is null and void.—K. B.—*Normandeau vs Amblement*, 2 R. de L., p. 207.

2. The power of a tutor, without the sanction of a court of justice having been previously obtained, does not extend to selling any portion of the immoveable property of his ward or any portion of that property which is of mixed character; and, further, his power is also restricted from selling any portion of the moveable property of the ward without the intervention and previous sanction of a court of justice having been first obtained, except such portion of it as is unproductive of revenue and such portion also as being of a perishable

Digitized by Google

character will necessarily cease to exist or will become deteriorated in value at the period of time when the ward shall obtain his majority; and even this qualified power of disposing of property of an unproductive character is still further limited by a restriction from disposing of articles in the nature of heir-looms as to which an hereditary *pretium affectionis* is attached: therefore shares of a bank or bank stock fall within the description of moveable property which the tutor cannot dispose of without authority. The sale of shares in a bank by a tutor must be treated, not as a voidable transaction, but as actually void, and therefore the persons who bought the shares must not be included in any action brought in relation to such shares.—PRIVY COUNCIL.—*Bank of Montreal & Simpson*, 11 L. C. R., p. 377, 14 Moore P. C., Rep. p. 432.—Q. B.—10 L. C. R., p. 225.

3. The sale of a *bailleur de fonds* claim by a tutor, without authorization of a judge, is invalid.—TORRANCE, J.—*Pollico vs Elvidge*, 13 L. C. J., p. 333.

4. That the sale by a tutor of the immoveables of the minor, without the observance of the formalities prescribed by law, is null; and even when the tutor is authorized to sell such immoveables by the will of his deceased wife, from whose succession the property devolved to the minors, he is bound, after his appointment as tutor, to observe the formalities prescribed by law.—C. R.—*Pichette vs O'Hagan*, M. L. R., 2 S. C., p. 384.

5. L'appelant, qui était endetté en une certaine somme portant intérêt à l'intimé en sa qualité de tuteur à ses enfants mineurs, vendit une terre à l'intimé personnellement, une partie du prix devant rester entre les mains de l'acquéreur et étant fait " payable à l'âge de majorité respective des dits enfants, par part " égale entre eux, le dit acquéreur donnant par les présentes, quittance au dit " vendeur de tous les intérêts à lui payables en sa qualité de tuteur à ses dits " enfants sur la somme susdite et jusqu'à leur âge de majorité respective."—JUGÉ: Que le tuteur ne pouvait, comme il a essayé de le faire, changer à son profit le placement du capital appartenant à ses pupilles, non plus qu'appliquer à son profit personnel et d'avance les intérêts soit échus, soit à échoir sur le dit capital, et qu'en conséquence la délégation de paiement stipulée par le dit tuteur était nulle, comme étaient nuls aussi les prétendus paiements qu'il reconnaissait avoir reçus de l'appelant pour intérêts.—Q. B.—*Nadeau & Labbé*, 14 Q. L. R., p. 232.

298. Such authorization can only be granted in cases of necessity or for an evident advantage.

In the case of necessity, the judge or prothonotary grants his authorization only when it is established by a summary account submitted by the tutor, that the moneys, moveable effects and revenues of the minor are insufficient.

In all cases, the authorization indicates what property is to be sold or hypothecated, and any conditions deemed expedient.—C. S. L. C., c. 78, s. 23. [I. 333.]

Amendments:—Whereas the formalities prescribed for the judicial sale of immoveable property belonging to minors, and others incapable of acting for themselves, have been established solely for the protection of the latter; and whereas, in the case of the sale of

Digitized by Google

immoveables of small value, the price thereof is frequently absorbed, to the detriment of minors and their creditors, by the observance of the formalities required for the sale of such immoveables; therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. Articles 298 and 299 of the civil code, and the fifth title of the third part of the code of civil procedure shall not apply to the sale of immoveable property, the real value of which does not exceed the sum of four hundred dollars; the sale of such immoveables may take place in the manner set forth in the following section.

2. Whenever the real value of the totality of the immoveable or immoveables, belonging to minors or others incapable of acting for themselves, does not exceed the sum of four hundred dollars, a judge of the superior court may, upon petition presented to him to that effect, by the tutor and subrogate tutor of such minors, or by the curator of such persons as are incapable of acting for themselves, after making summary enquiry as to the value of the said immoveables, order the sale thereof by public auction, at the prices, and upon the conditions which he may deem just and reasonable to fix, in the interest of such minors or persons incapable of acting for themselves.

3. The judge shall have power to issue, under his hand, an order to compel the appearance before him, without costs, of any person whom he shall deem qualified to afford him the information necessary to determine the value of the said immoveables, and any such person, refusing to comply with such order, shall be guilty of a contempt of court.

4. Notice of the place, day and hour of such sale, shall be given twice in fifteen days, in the *Quebec Official Gazette*, and in two newspapers indicated by the judge, one of which shall be published in the French and the other in the English language, in the district in which the immoveables are situated, and, in the event of there being no newspapers published in such district, then such notice shall be given in the newspapers of the nearest district.

5. The judge may, when he shall deem it advisable, dispense the petitioners from the necessity of publishing the notices mentioned in the preceding section, and authorize them to proceed to the sale, by consent, of the said immoveables, to any person paying the price fixed by such judge.—Q. 35 Vict., cap. 7.

The Act of this Province, thirty-fifth Victoria, chapter seven, shall hereafter be read and interpreted as if each of the terms "immo-

Digitized by Google

veable," "immoveables," and "immoveable property" included, and they shall hereafter be held to include, any capital sums belonging to minors or other persons incapable of acting for themselves, and all shares or interest of minors so incapable, in any financial, commercial or manufacturing joint stock company.—Q., 36 Vict., cap. 17.

The Act of this Province, thirty-fifth Victoria, chapter seven, shall in future read and be interpreted as if each of the terms "immoveable," "immoveables" and "immoveable property" comprehended, and they shall be deemed to comprehend all immoveable rights whatsoever belonging to minors.—Q., 36 Vict., cap. 18.

See also the Acts noted as amendments to the preceding article.

DECISION :—La loi veillant d'un œil jaloux sur la conservation des biens, et surtout des immeubles des mineurs, il faut de très fortes raisons pour en autoriser l'aliénation, et ces immeubles doivent dans tous les cas n'être vendus que lors qu'il y a nécessité de le faire. Et en l'absence de preuve de cette nécessité le juge, même sur l'avis d'une majorité des parents présents en assemblée, ne doit pas ordonner la vente.—*Q. B.—Béliveau & Chèvrefils*, 2 Q. L. R. p. 191.

299. The sale, although authorized, must, in order to be valid, be made judicially, in presence of the subrogate-tutor, to the highest bidder, by public auction before the court, judge, prothonotary, or any other person specially appointed for that purpose, and after publications made at such times and places as are named by the judgment authorizing it.—Pothier, *Personnes*, 617 ; *Cout d'Orl., Intr. au titre* 9, n. 16 ; Ferrière, *Tutelles*, 226, 227, 232 ; Meslé, 144 ; 1 Argou, 60, 61 ; 1 Maleville, 411 ; 1 Bousquet, 567 ; C. S. L. C., c. 78, s. 23 ; C. N., 459. [I. 333.]

Amendments :—All judicial sales of property belonging to minors and absentees, made before the passing of this act, shall be deemed to be valid notwithstanding any failure to annex to the deeds thereof the certificates of the publishers of the newspapers, or the newspapers themselves, in which such sales were published, if the necessary publications were made, and if the deeds of such sales mentioned the newspapers in which such publications were made ; provided always, that such deeds of sale are valid in other respects.

Whereas, since the promulgation of the civil code, many judicial sales of the property of minors and of absentees have taken place, without the presence of the subrogate-tutor, contrary to the provisions of article 299 of the said code ; it is hereby enacted that such sales shall be valid if in addition to the necessary formalities, other than those prescribed by the said article 299, having been in all respects observed, the subrogate-tutor interested in the sale ratifies

Digitized by Google

and signs the deed of sale; and from such time, the sale so made, shall be, to all intents and purposes whatsoever, as binding and valid, as if the same had been made in the presence of the subrogate-tutor, and he had himself become a party thereto.

The provisions of this act shall not in any way prejudice the acquired rights of any parties to suits now pending before any court of justice in this province.—Q. 33 Vict., cap. 23, ss. 3, 4 & 5.

In the case of sale of securities, such as capital sums, shares or interest in financial, commercial or manufacturing joint stock companies or public securities, belonging to minors, interdicts or absentees or to substitutions, the judge or the court authorizing such sale upon the advice of a family council, may, if he or it deem it meet, order that the sale be made, at the current rate upon the Stock Exchange, by a broker or other person appointed for that purpose, without advertisement or other formalities; and the judge or court, in case he or it may deem the same advisable, may authorize, during such delay as shall be determined, the gradual disposal of such securities at the current rate upon the Stock Exchange.

The person appointed shall make a report of all sales by him made, which shall be deposited in the clerk's office where the authorization for the sale has been deposited, with an attestation under oath, showing the current market value of similar securities upon the Stock Exchange on the day of each sale.—Q. 42-43 Vict., cap. 26.

DECISIONS:—1. The observance of the required formalities preliminary to a sale of land belonging to minors, as, for example, that the required publications of such sale were duly made, cannot be established by verbal testimony. In such a case as the above, where the required publications of the sale were not legally proved to have been made, the sale will be adjudged to have been inoperative and null, and the purchaser of such land at a public sale will be condemned to restore the same to such minors.—DAY & MONDELET, JJ.—*Poustie vs McGregor*, 9 L. C. J., p. 332.

2. L'autorisation à vendre la part des mineurs dans une propriété donnée par le protonotaire, avec l'ordre à tous les co-propriétaires d'accéder à telle vente, et l'adjudication faite de tel immeuble conformément à cette autorisation, équivaut à licitation et partage, et doit avoir tous les effets d'un partage vis-à-vis des créanciers de chaque co-héritier qui a pu hypothéquer quelque partie indivise du dit immeuble. L'accession de tous les co-propriétaires à telle vente conformément à l'ordre du protonotaire, fait présumer chez ceux-ci l'intention de faire cesser l'indivision et de procéder à partage. L'adjudicataire de l'immeuble ainsi vendu est censé avoir acquis le dit immeuble directement de la personne décédée. —CHAGNON, J.—*Monette vs Molleau*, 6 R. L., p. 561.

300. The formalities required by articles 298 and 299 for the alienation of the property of a minor, do not apply to cases where a

Digitized by Google

judgment, on the demand of a coproprietor, has ordered the licitation of undivided property. But in these cases, the licitation can only be made in the form prescribed by law. Strangers are admitted to bid.—Pothier, *Personnes*, 617 ; *Vente*, n. 516 ; *Société*, n. 171 ; *Commun.* n. 710 ; 4 Pand. Franç., 588 ; C. N., 460. [I. 333.]

301. [A tutor cannot accept or renounce a succession, which falls to his pupil, without authorization being granted on the advice of a family council. The acceptance can only be made under benefit of inventory. Accompanied by these formalities the acceptance or renunciation has the same effect as if made by a person of age.]—Pothier, *Personnes*, 616 ; *Successions*, 135 ; 2 Freminville, *Tutelle*, 3 ; 1 Gin, 33 ; 2 Toullier, 394 ; 1 Delvincourt, 125 ; Montvallon, 143 ; 2 Chabot, *Successions* ; C. N., 661. [I. 333 to 335.]

DECISIONS :—1. Que quoiqu'un tuteur ne puisse accepter une succession ou un legs pour les mineurs qu'il représente, que sur avis de parents et sous bénéfice d'inventaire, néanmoins un jugement condamnant purement et simplement un tuteur à payer une dette de l'auteur des mineurs qu'il représente, peut devenir chose jugée contre les mineurs (sauf recours contre leur tuteur) et les lie vis-à-vis du créancier qui a obtenu ce jugement.—Q. B.—*Roy & Pineau*, 3 Q. B. R., p. 146.

2. Que les mineurs, peuvent, vis-à-vis les créanciers, renoncer à une succession qu'ils auraient antérieurement acceptée, et ce par acte devant notaire, et que la reddition de *compte* qu'ils font ensuite au curateur nommé à telle succession, constitue pour eux une décharge valable de leur administration pour l'avenir. Que dans l'espèce, y eût-il doute sur la valeur de leur renonciation et du mode de rendre compte, les mineurs ne pouvaient être poursuivis comme héritiers purs et simples.—Caron, J.—*Julien vs Hart*, 11 Q. L. R., p. 325.

3. That where a tutor to minors sues in their behalf for a debt due their late father, alleging that they have accepted the succession and the fact of such acceptance is put in issue by the Defendant, the Plaintiff cannot succeed if it appear that they had not legally accepted, *i. e.* with the previous authorisation of a family council.—Brooks, J.—*Johns vs Patton*, 10 L. N. p. 45-31, L. C. J. p. 96, M. L. R., 3 S. C., p. 113.

4. Que la cession de biens mentionnée à l'article 763 et suivants du C. P. C., et au statut de Québec 48 V. c. 22, ne s'applique pas à la liquidation des biens d'une succession appartenant à des mineurs ; que, par suite, une succession des biens ainsi faite par une tutrice ès-qualité pour ses enfants mineurs insolvables à la demande d'un créancier est illégale et doit être mise de côté.—Mathieu, J.—*Tourville vs Dufresne*, M. L. R., 3 S. C., p. 288.

302. [In any case where a succession renounced in the name of a minor has not been accepted by any one else, it may be afterwards accepted either by the tutor duly authorized on the advice of a family council consulted anew, or by the minor become of age ; but it is so

Digitized by Google

taken in the state in which it is then, and the sales or other acts legally made during the vacancy cannot be questioned.]—2 Frémin-ville, *Tutelle*, pp. 2, 3 ; 4 Pand. Franç., pp. 590 et seq. ; 1 Maleville, 412-3 ; 6 Locré, *Esp. du Code*, 280-1 ; 1 Bousquet, 572 ; 1 Zachariæ, 438 : C. N., 462. [I. 335.]

303. Gifts made to a minor may be accepted by his tutor, or a tutor *ad hoc*, or by his father, mother, or other ascendants ; such acceptance being valid without the advice of any family council.—Ord. des donations, 1731, art. 7 ; Meslé, 393 ; 1 Ricard, *Donations*, 195 ; 1 Sallé, *Esprit des ord.* de 1731, pp. 45 et seq. ; C. N., 463. [I. 335.]

DECISION :—A gift was purported to have been made by a father to his children of certain bank stock, by means of a document transferring the shares from his own name, to his own name *in trust*. Held, insufficient to make a valid donation, as there was no legal acceptance.—MEREDITH, C. J.—*Walsh vs Union Bank*, 5 Q. L. R., p. 289.

304. Actions belonging to a minor are brought in the name of his tutor, except those for wages, which minors when of the age of fourteen years may bring alone to the amount of [fifty] dollars. No action brought by a tutor can be maintained unless he shows that the act of tutorship has been registered.—C. S. L. C., c. 82, s. 35 ; c. 37, s. 33 ; c. 94, s. 21 ; 1 Pigeau, p. 67. [I. 335.]

Amendment :—This article is repealed and is replaced by the following :

" 304. Actions belonging to a minor are brought in the name of " his tutor. Nevertheless a minor of fourteen years of age may bring " alone actions to recover his wages. He may also with the authority " of a judge, bring alone all other actions arising from the contract " for the hire of his personal services."—Q. 51 Vict., cap. 22, s. 1.

DECISIONS : —1. A tutor or guardian to children resident in a foreign country, if duly appointed according to the laws of that country, can support an action on their behalf.—K. B.—*Allen vs Cottman*, I R. de L., p. 345.

2. A plaintiff who sues in any action *en autre droit* must make a proof of his authority, and a tutor must therefore file his *acte de tutelle* with his declaration.—K. B.—*Lees vs Scott*, I R. de L., p. 350.

3. A tutor in a hypothecary action may file a plea of *déguerpissement*, for his pupil, but it must be founded on an *avis de parents*.—K. B.—*Taché vs Levasseur*, 3 R. de L., p. 38.

4. An opposition to a sale of real estate by a tutor *ad hoc* authorized to act for the minors, is maintainable without registration of such *acte de tutelle* and that the 24th section of the Registration Ordinance (4 V. c. 30) does not apply to such oppositions.—C. B.—*Chouinard vs Demers*, 5 L. C. R., p. 401.

Digitized by Google

5. A tutor appointed to accept a donation and to collect interest arising from an obligation, cannot maintain an action at law until his tutorship has been registered.—SMITH, J.—*Langlands vs Stansfield*, 7 L. C. J., p. 45.

6. Un mineur n'a pas droit de poursuivre en son nom pour ses gages, quand l'engagement a été fait par le père sous la puissance et le contrôle duquel est le mineur.—SICOTTE, J.—*Allard vs Wilcot*, 13 L. C. J., p. 28.

7. The father of a minor may bring an action *en déclaration de paternité* without being appointed tutor *ad hoc* to her.—Q. B.—*Patoille & Desmarais*, 1 L. C. L. J., p. 58.

8. Un père, non tuteur de son fils mineur, ne peut poursuivre pour les gages de ce dernier. Défense en droit maintenue.—MCKAY, J.—*Carson vs Bishop*, 2 R. L., p. 624.

9. Un père a, comme tel, le droit d'utiliser les services de son enfant mineur, de l'engager et de poursuivre pour ses gages.—TASCHEREAU, J.—*Coran vs Sylvain*, 2 R. L., p. 736.

10. Un tuteur *ad hoc* ne peut intenter une action pour un mineur qui n'a pas de tuteur, pour l'inexécution d'une promesse de mariage ; et le pourrait-il, il devrait d'abord faire enrégistrer l'acte de tutelle.—TASCHEREAU, J.—*Brosseau vs Bédard*, 3 R. L., p. 447.

11. The mother of a natural child cannot in her own name and without being appointed tutrix *ad hoc*, bring an action asking that the defendant be declared to have the civil status of father to her illigitimate child.—JOHNSON, J.—*Giroux vs Herbert*, 5 R. L., p. 439.

12. Que le père qui n'a pas été nommé tuteur à son enfant mineur, n'a pas le droit d'intenter pour lui une action pour gages, à moins qu'il n'ait lui-même loué les services de son enfant, et que la reconnaissance de la dette par le défendeur au père ne peut valoir, parce qu'une telle reconnaissance ne peut faire revivre une dette qui n'a jamais été due au père.—CASAULT, J.—*Renault vs Dussault*, 6 Q. L. R., p. 259, 4 L. N., p. 63.

13. Que le père peut en son nom personnel poursuivre pour injures faites à sa fille mineure.—ROUTHIER, J.—*Bouchard vs Charette*, 10 L. N., p. 186.

See also cases noted at C. C., 249 & 290.

305. A tutor cannot demand the definitive partition of the immoveable property of the minor, but he can, even without authorization, defend an action of partition brought against such minor.—Pothier, *Commun.*, nn. 695-6; *Société*, n. 164; *Personnes*, tit. 6, sec. 4, art. 3, § 2; Lamoignon, tit. 6, art. 111; Lebrun, *Successions*, liv. 4, c. 1; 1 Maleville, 414-5; 4 Pand. Franç., 599, 600. [I. 335.]

DECISION:—A tutor has a right when duly authorized, to take up the *instance* in and prosecute an action *en partage* already begun by the *auteurs* of the minor.—Q. B.—*Cutting & Jordan*, 10 R. L., p. 401, 19 L. C. J., p. 139.

306. A tutor cannot appeal from a judgment, until he is authorized by the judge, or the prothonotary, on the advice of a family council.—Ord. avril 1560; Meslé, 44; Locré, *Esprit du Code*, 290. [I. 335.]

Digitized by Google

DECISIONS :—1. A tutor cannot legally appeal without being specially authorized *en justice.*—Q. B.—*Bessenner & De Beaujeu*, 16 L. C. J., p. 224.

2. The curator to an interdicted person cannot appeal from a judgment until he is authorized by the judge, or prothonotary on the advice of a family council. [C. C. 343.]—Q. B.—*Clement & Francis*, 6 L. N., p. 325, 4 Q. B. R., p. 13.

307. [A tutor cannot transact in the name of the minor unless he is authorized by the court, the judge or the prothonotary, on the advice of a family couucil. Accompanied by these formalities, transaction has the same effect as if made with a person of age.]—C. N., 467. [I. 335 to 337.]

SECTION VI.—OF THE ACCOUNT OF TUTORSHIP.

308. Every tutor is accountable for his administration, when it has terminated.—*ff* L. 1, § 3, *De tutelæ et rationibus*; *Novel.* 72, *c. ult.*, Ord. 1667, tit. 29; Pothier, *Personnes*, 622; *Cout. d'Orl., Intr. au titre* 9, n. 17; Ord. 1560; 2 Pigeau, 27; 1 Bousquet, 580; 2 Maleville, 417; 1 Gin. 339; C. N., 469. [I. 337.]

DECISIONS :—1. It is not competent to a minor become major or his assignee to bring an action against his tutor for a specific sum of money which appears by the tutor's account, pending his administration as tutor, to be a *reliquat* due by the tutor at a specified date during the administration. Until the rendering of the account of tutor, the only action by the minor become major against his tutor arising out the administration, was the *actio tutelæ directæ.*—TORRANCE, J.—*Bureau vs Moore*, 17 L. C. J., p. 235.

2. Que le tuteur dont la tutelle a été annulée et qui a rendu un compte de son administration aux nouveaux tuteurs qui lui ont succédé, et qui ont reçu les pièces justificatives et le reliquat du compte reconnu par le rendant compte, n'est pas tenu de rendre un autre compte en justice; que les nouveaux tuteurs qui n'ont pas accepté le compte qui leur a été rendu avec les formalités requises par la loi, n'ont d'action que pour débattre et faire réformer le compte présenté, et non une action en reddition de compte.—Q. B.—*Methot & Dufort*, 3 Q. B. R., p. 262.

3. Qu'un tuteur ne peut s'exempter de rendre compte de sa tutelle, parce qu'il aurait en mains une somme insignifiante qu'il avait dépensée aux vu et su du mineur devenu majeur depuis, et parce qu'il aurait fait un autre acte d'administration ratifié par le mineur après sa majorité.—RAINVILLE, J.—*Pelletier vs Pelletier*, 10 R. L., p. 470.

4. Que, dans une action en reddition de compte, lorsque le défendeur prétend qu'il n'est pas tenu de rendre compte, mais produit un compte avec son plaidoyer, la Cour doit d'abord adjuger sur l'obligation du défendeur de rendre compte, et ordonner la production d'un compte tel que demandé, pour être ensuite débattu suivant la loi, et qu'un jugement qui décide de l'obligation de rendre compte et de la valeur du compte produit par le défendeur sera renversé. —C. R.—*McAdam vs Wilson*, 12 R. L., p. 523.

Digitized by Google

309. Any tutor may be compelled, even during the tutorship, on the demand of any one related or allied to the minor, of the subrogate-tutor, or of any other parties interested, to produce from time to time, a summary account of his administration; such account to be furnished without any judicial formality or costs.—*ff* L. 5, § 11, *De rebus eorum*; 2 Louët et Brodeau, *lettre* M, som. 15, p. 170; Serpillon, *sur Ord.* 1667, tit. 29, p. 535; Lacombe, vo. *Tuteur*, sec. 8, p. 784; Meslé, 290; Du Parc Poullain, 297; Raveau, 557; 2 Pigeau, 104 et seq.; 1 Bourjon, 62; 1 Maleville, 418; 1 Gin. 341; C. N., 470. [I. 337.]

DECISION:—Que le curateur, à l'interdit peut, sur requête sommaire présentée par le beau-frère de l'interdit, être condamné à fournir un compte sommaire de sa gestion. (C. C. 343.) — MATHIEU, J.—*Robillard vs Laramée*, 13 R. L. p. 668.

310. The definitive account of a tutorship is rendered at the cost of the minor, when he has attained his majority, or has been emancipated; the tutor advances the costs of such account.

He is allowed all the expenses which he can justify, and of which the object was useful.—Ord. 1667, tit. 29; Pothier, *Personnes*, 614, 623; *Cout. d'Orl., Intr.* tit. 9, n. 18: Domat, liv. 2, tit. 1, sec. 5, nn. 1-2; 1 Delvincourt, 129; 4 Pand. Franç., 467, 607; C. N., 471. [I. 337.]

DECISIONS:—1. In an action of account against a tutor, the oath of the defendant as to *dépenses modiques* is sufficient voucher.—K. B.—*Racine vs Racine*, 1 R. de L., p. 351.

2. Minors as well as their tutor, are directly liable to a notary, for the price of an account of the gestion of their tutor rendered by him, although it was the tutor who employed the notary.—SMITH, J.—*Easton vs Court*, 8 L. C. J., p. 124.

3. Le tuteur rendant compte n'est point tenu aux frais de la demande en reddition de compte s'il ne l'a point contestée. Cette question n'est pas laissée à la discrétion de la cour comme sont la plupart de celles qui ont rapport aux dépens.—C. R.—*Loiselle vs Loiselle*, 10 L. C. J., p. 258.

311. Every settlement between a minor become of age and his tutor, relating to the administration and account of the latter, is null, unless it is preceded by a detailed account, and the delivery of vouchers in support thereof.—Pothier, *Personnes*, 622; *Cout. d'Orl., Intr. tit.* 9, n. 18; 1 Argou, 68; Lamoignon, tit. 4, art. 129; 1 Maleville, 420; 1 Gin. 340; C. N., 472. [I. 337.]

DECISIONS:—1. A transaction between a tutor and his wards based upon an incorrect inventory whilst the age of the children is still uncertain will not be set aside if the transaction has been confirmed by subsequent transactions between the parties at a period when the minors were of full age, had ceased to

Digitized by Google

be under the control of their tutor and had a knowledge that the inventory was incorrect.—PRIVY COUNCIL.—*Motz & Moreau*, 10 L. C. R., p. 84, 13 Moore P. C., Rep. p. 376.—C. R.—5 L. C. R., p. 433.

2. Un compte rendu en bloc par un tuteur à son mineur devenu majeur et par lui accepté sans pièces justificatives, est nul *ipso jure*. Sur une demande en reddition de compte par le mineur, une exception lui opposant un tel compte ne constitue aucune fin de non-recevoir. Le tuteur doit être condamné à rendre compte de nouveau.—SMITH, J.—*Ducondu vs Bourgeois*, 2 L. C. J., p. 104.

3. Le pupille, devenu majeur, peut référer à la décision d'arbitres, les différents soulevés entre lui et son tuteur, sur le compte que ce dernier lui rend, et cette référence n'est pas un traité relatif à la question et au compte de tutelle, mais un moyen expéditif et favorable au mineur pour faire décider ses contestations contre le compte que présente le tuteur.—SICOTTE, J.—*Laporte vs Laporte*, 3 R. L., p. 37.

4. The nullity pronounced by 311 C. C., with regard to a settlement between a minor become of age and his tutor, relating to the administration, is only a relative nullity, and must be invoked by the pupil, who cannot bring an action to account, *de plano*, against the tutor, without asking to be relieved from the discharge given upon the first account rendered by the tutor.—Q. B.—*Pierce & Butters*, 24 L. C. J., p. 167, 3 L. N., p. 28.

5. Que dans l'espèce, l'intimée a tacitement acquiescée à l'inventaire préparé par son tuteur par la vente qu'elle lui a faite, conjointement avec son mari, comme chef de la communauté, de tous les biens mobiliers et immobiliers lui appartenant, et dont son tuteur, en cette qualité, avait eu la gestion, et que cette vente quoique non précédée d'une reddition de compte par le tuteur à sa pupille, est valable et équivaut à une quittance et décharge par le mari de l'Intimée et cette dernière, auxquels le compte de tutelle était dû.—Q. B.—*Grégoire & Grégoire*, 4 Q. B. R., p. 308, 30 L. C. J., p. 286, M. L. R., 2 Q. B., p. 228, 12 Q. L. R., p. 32. *Confirmed in the Supreme Court*, 9 L. N., p. 410.

6. Que les mineurs devenus majeurs ne peuvent se plaindre de l'administration de leur tuteur, lorsque, depuis leur majorité, ils ont accepté son compte, lui ont donné une décharge et ont fait actes d'héritiers.—LORANGER, J.—*Banque Jacques-Cartier vs Pinsonnault*, M. L. R., 1 S. C., p. 18.

312. If the account give rise to contestations, they are proceeded with and adjudicated upon in the manner provided in the Code of Civil Procedure.—Pothier, *Personnes*, 624; Ord., 1667, tit. 29. [I. 337.]

313. Any balance due by the tutor bears interest without demand, from the closing of the account. Interest on any sum due by the minor to the tutor, only runs from the time of his being put in default by the tutor, after the closing of the account.—Pothier, *Personnes*, 624-5; Lamoignon, tit. 4, art. 127-8; 1 Argou, 68; 1 Bousquet, 584; 1 Maleville, 421; 1 Gin. 341-2. [I. 337.]

DECISION:—That the Appellant was not entitled to charge interest on sums by him advanced for the care and education of the Respondents, but that he was entitled to interest on all debts bearing interest which he had paid beyond and

Digitized by Google

above the monies he held in his hands belonging to the estate.—Q. B.—***Miller & Coleman***, 2 Q. B. R., p. 33.

314. Every minor is, of right, emancipated by marriage.—Paris, 239, 272; Lamoignon, tit. 2, art. 2; tit. 4, art. 121; 1 Argou, 64; Meslé, 210-2-6; Pothier, *Personnes*, 621; *Cout. d'Orl., intr.* tit. 9, n. 21; 4 Pand. Franç., 610: 1 Gin. 342 et seq.; C. N., 476. [I. 337.]

315. An unmarried minor may, at his own request, or that of his tutor, or of any one related or allied to him, be emancipated by any court, judge or prothonotary having jurisdiction to confer tutorship, on the advice of a family council called and consulted as in the case of tutorship.—34 Geo. III, ch. 6, s. 8; 12 Vict., ch. 38, s. 8; C. S. L. C., ch. 86, s. 1; ch. 78, s. 23; 1 Argou, 64; Pothier, *Personnes*, 622; *Cout. d'Orl., intr.* tit. 9, n. 18; Nouv. Denizart, vo *Emancipation*, § 5, n. 4, p. 502; 4 Pand. Franç., 616; 1 Gin. 344; C. N., 478. [I. 337 to 339.]

DECISION:—A minor aged 19 years and upwards may be emancipated as regards the administration of her property. — BADGLEY, J.—***Shaw vs Cooper***, 9 L. C. J. p., 166.

316. If the emancipation be granted out of court, it is subject to revision, and may be annulled by the court to which the judge or prothonotary who pronounced it belongs. From this judgment an appeal lies.—C. S. L. C., c. 86, s. 1; c. 78, s. 23. [I. 339.]

317. Whether emancipation results from marriage or is granted judicially, a curator must be appointed to the emancipated minor.—5 Nouv. Denizart; p. 503. [I. 339.]

318. The account of the tutorship is rendered to an emancipated minor with the assistance of his curator.—Lamoignon, tit. 4, art. 124; Pothier, *Personnes*, 626; Meslé, 290; 1 Gin. art. 346; 1 Maleville, 420-8; 4 Pand. Franç., 616; C. N., 480. [I. 339.]

319. An emancipated minor may grant leases for terms not exceeding nine years; he may receive his revenues, give receipts therefor, and perform all acts of mere administration. [He is not relievable from these acts, except in cases where persons of age would be so.] [I. 339.]

DECISIONS:—1. Qu'un mineur, émancipé par mariage, peut, sans l'assistance d'un curateur, intenter les actions mobilières, et, par suite, poursuivre en dom-

Digitized by Google

mages pour injures.—MATHIEU, J.—*Miller vs Cléroux*, 12 R. L., p. 620, M. L. R., I S. C., p. 223.

2. An emancipated minor can bring or defend an *action mobilière* without the assistance of his curator.—C. R.—*Gagnon vs Sylva dit Portugais*, 24 L. C. J., p. 251.

3. Que le mari d'une femme mineure, commune en biens avec lui, qui se trouve émancipée par son mariage, peut poursuivre le recouvrement des intérêts qui lui sont dus, sur le prix d'une vente d'un immeuble lui appartenant faite pendant sa minorité.—Q. B.—*Nadeau & Cliche*, 16 R. L., p. 379.

320. He can neither bring nor defend a real action without the assistance of his curator.—Pothier, *Personnes*, 602-3, 622; *Oblig.*, n. 877; Serres, *Instit.*, 141-2; Boutaric, *Instit.*, 107; 1 Pigeau, 68; 1 Argou, 71-2; 1 Maleville, 428; 1 Gin. 347; 4 Pand. Franç., 618 et seq.; C. N., 482. [I. 339.]

321. An emancipated minor cannot borrow without the assistance of his curator. Loans of large amount, considering his means, when effected by deeds bearing hypothec, are null, although made with the assistance of his curator, if they be not authorized by the judge or prothonotary, on the advice of a family council; with the exception of the cases provided for in article 1005.—*ff* L. 27, § 2, *de minoribus*; Ferrière, *Tutelles*, 230-1; Meslé, 390-1; Serres, *Instit.*, 141; 2 Fréminville, *Tutelles*, n. 1066; 1 Maleville, 430-1; 4 Pand. Franç., 618; 6 Locré, *Esp. du Code*, 350 et seq.; C. S. L. C., c. 78, s. 23; C. N., 483. [I. 339.]

322. Moreover, he can neither sell nor alienate his immoveable property, nor perform any acts other than those of mere administration, without observing the formalities prescribed for unemancipated minors.

With respect to any obligations which he may have contracted by purchase or otherwise, they may be reduced if exceessive; the courts taking into consideration the fortune of the minor, the good or bad faith of the persons who have contracted with him, and the utility or inutility of the expenditure.—*Cod.*, L. 3, *de his qui veniam ætatis*; Pothier, *Personnes*, 603; *Cout. d'Orl.*, tit. 9, art. 181, note 5; 6 Locré, *Esp. du Code*, 354; 1 Maleville, 430; 4 Pand. Franç.. 619; C. N., 484. [I. 341.]

DECISIONS:—1. Une femme mariée encore mineure peut, avec la seule autorisation de son mari, ratifier un acte d'échange, consenti par le mari, d'un immeuble affecté aux douaire préfixe et reprises matrimoniales de cette femme, tels droits de la femme étant des droits purement mobiliers.—Q. B.—*Métrissé & Brault*, 10 L. C. R., 157.

Digitized by Google

2. Le mineur émancipé peut valablement aliéner ses biens meubles.—Q.B.—*Métrissé & Brault*, 4 L. C. J., p. 60.

3. Un mineur peut être poursuivi en son propre nom pour des objets de nécessité pour le paiement desquels il est responsable, et il n'est pas nécessaire que l'action, dans ce cas, soit dirigée contre le tuteur du mineur.—MONK, J.—*Thibaudeau vs Magnan*, 4 L. C. J., p. 146.

323. A minor engaged in trade is reputed of full age for all acts relating to such trade.—1 Despeisses, part. 4, tit. XI, sec. 2, n. 22, and authors cited by him ; 2 Henrys, liv. 4, *quest.* 127 ; Lacombe, vo. *Restitution*, sec. 2, n. 10 ; Ord. 1673, tit. 1, art. 6 ; 2 Bornier, 448 ; 4 Pand. Franç., 622-3 ; 1 Maleville, 431 ; 4 Sebire et Carteret, 571 ; C. N., 487. [I. 341.]

DECISIONS:—1. A minor, *marchand publique*, can be sued and condemned for debts contracted in the transaction of his business without its being necessary that a tutor should be appointed, such minor being with respect to such transaction reputed of full age.—C. R.—*Danais & Côté*, 5 L. C. R., p. 193.

2. Un mineur faisant commerce peut légalement, s'obliger pour sa pension et nourriture, et être assujetti, en ce cas, à l'arrestation par *capias ad respondendum*.—SMITH, J.—*Yule vs Wales*, 12 L. C. R., p. 292.

3. A minor is liable for his board when contracted for as a trader and in the course of his business.—SMITH, J.—*Browning vs Gale*, 6 L. C. J., p. 251.

4. The maker of a promissory note, though a minor, may be sued upon a note, the consideration of which was goods purchased by him for use in his trade.—MACKAY, J.—*City Bank vs Lafleur*, 20 L. C. J., p. 131.

TITLE TENTH.

OF MAJORITY, INTERDICTION, CURATORSHIP AND JUDICIAL ADVISERS.

CHAPTER FIRST.

OF MAJORITY.

324. Majority is fixed at the complete age of twenty-one years. At that age persons are capable of performing all civil acts.—Pothier, *Personnes*, tit 5 ; C. S. L. C., c. 34, s. 1 ; C. N., 488. [I. 341.]

Digitized by Google

CHAPTER SECOND.

OF INTERDICTION.

325. A person of full age, or an emancipated minor, who is in an habitual state of imbecility, insanity or madness, must be interdicted, even though he has lucid intervals.—*ff De curatoribus furioso; Cod.*, L. 1, L. 6, *de curatore furiosi; Instit. de curatoribus*, § 3; Pothier, *Personnes*, 625; Anc. Deniz., vo. *Interdiction*; Merlin, Rép., vo. *Interdict.*, §§ 3, 4, nn. 1, 2, 6; C. N., 489. [I. 341.]

Amendments:—Whereas the drunkenness of certain heads of families and other persons of full age, and of other persons fully enjoying civil rights in this province, has, heretofore, on many occasions, been the cause of ruin to their families, and of grievous injury as well to their relations as to their creditors; and whereas, in the interests of society, it is necessary for the future to remedy such evils; and whereas experience has shown that drunkards who appear most incurable, may often be reclaimed by a reasonable and regular course of treatment, and that such course of treatment can be efficaciously pursued only in institutions organized for the purpose; Therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. On petition, under oath, presented to any one of the judges of the superior court for Lower Canada, who alone shall have power to act, by any relations, whether of blood or by affinity, or in default of relations, by any friend of any habitual drunkard, setting forth that by reason of such drukenness, such habitual drunkard either squanders his property, or mis-manages his property, or places his family in trouble or distress, or transacts his business prejudicially to the interests of his family, his friends or his creditors, or that he uses intoxicating liquors to such an extent that he incurs the danger of ruining his health and shortening his life thereby, such judge, for any of such reasons, established before him to his satisfaction, may pronounce the interdiction of such habitual drunkard and appoint a curator to him, to manage his affairs and control his person, as in the case of one interdicted for insanity.

2. The interdiction of such habitual drunkard shall be proceeded with before a judge, by summoning before such judge a family council as in the case of tutorships, under the provisions of the civil code of this province, and by taking the opinion, under oath, of each person composing the said family council, as to the truth of the fact of

Digitized by Google

the person whose interdiction is proposed being an habitual drunkard, and as to the necessity of such interdiction; but the person making such demand in interdiction shall not form part of such family council.

3. The interdiction of any person interdicted as an habitual drunkard, shall have the same effects as those conferred by the law in force in this province, in the case of the interdiction of any person for insanity.

4. In proceeding to the interdiction of any person for habitual drunkenness, it shall not be necessary that the proof of any of the facts to be established for such purpose, before the judge, be taken in writing, nor that the person, whom it is sought to interdict, be interrogated before the judge, but it shall be sufficient that the judge be satisfied with the oral evidence given before him by the relations, whether of blood or by affinity or friends, composing the family council assembled for the purpose of such interdiction.

5. The petition praying for the interdiction of any habitual drunkard shall be personally served upon him at a time when he shall be sober, or if at the time of the said service the person, whose interdiction is demanded is not sober, the said petition shall be served upon a reasonable person of his family, at least eight days before that fixed for the appearance before the judge for the purpose of the interdiction.

6. It shall be lawful for the person, whose interdiction shall be thus demanded, to produce before the judge, witnesses to contradict the allegations of the petition and the evidence of any or all of the members of the family council; and each party may retain an advocate and counsel to conduct the proceedings on his behalf and to examine the witnesses before the judge, who may require from the person instituting the demand in interdiction, further evidence of the facts alleged in the said petition, in addition to that of the family council; but as hereinbefore set forth, all evidence given before the judge shall be *viva voce* or taken in writing, as the judge shall deem proper.

7. The decision of the judge shall be final and without appeal, whether he grants the interdiction or rejects the demand therefore.

8. If any demand in interdiction under this act be rejected, the same shall not be renewed before the expiration of three calendar months.

9. Any person interdicted as an habitual drunkard, may be relieved from such interdiction, after one year's sober habits, and the removal thereof shall be effected by observing the same formalities as

Digitized by Google

those prescribed to obtain the interdiction, and the person interdicted shall not regain the exercise of his civil rights, until after the judgment removing the interdiction.

10. The wife or the son of full age, of any person interdicted for habitual drunkenness, may be appointed his curator, and when the wife of the person interdicted shall have been appointed, she shall have all the powers of the curators to persons interdicted for prodigality, and shall be subject to the provisions of article 180 of the civil code, save in so far as regards acts of simple administration, and for such acts her appointment as curatrix shall avail as full authorization.

11. Whosoever shall wilfully sell or give to, or procure for any person interdicted under this act, intoxicating liquors, shall incur for each offence, a penalty of forty dollars, recoverable by the curator for and on behalf of the family of the person interdicted, by summary proceeding within three calendar months from the commission of such offence, before any justice of the peace of the district in which the offence shall have been committed, and in default of payment of the said penalty, together with the costs of suit, within the delay fixed by the said justice of the peace, the offender shall be imprisoned in the common gaol of the district in which he resides, for the space and term of three calendar months, unless the said penalty and costs and the costs of imprisonment, and of the conveyance of the defendant to the said gaol, be sooner paid.

12. Any person who, according to the common report of the neighborhood, has the reputation of being a drunkard, shall be deemed to be an habitual drunkard, according to the intent and meaning of this act.

13. All proceedings under this act shall be summary, and the forms hereunto annexed or any other analogous forms shall be sufficient; and the same shall not be attacked for any error in form or for any irregularity, before any court.

14. The name of every person interdicted under this act, shall be inscribed on the roll of interdicted persons, as in other cases of interdiction.

15. The lieutenant-governor may, if he deem proper, grant a license to keep an asylum for the use of drunkards to the person or persons, or to the association of persons, who may appear to him to deserve the same.

16. The granting of the said license and the continuation thereof, shall be subject to the orders and regulations passed in respect thereof

Digitized by Google

by the lieutenant-governor in council, who shall at the same time define the powers and privileges, and also the duties and obligations of the director or directors of the said institution.

17. The curator of any person interdicted under this act may place the person interdicted, whose curator he is, in any duly licensed institution for the cure of drunkards, and may remove him from the same, whenever he shall deem it desirable.

SCHEDULES.

A.

FORM OF PETITION FOR INTERDICTION.

Province of Quebec, }
District of }

To the honorable A. B., one of the judges of the superior court for Lower Canada:

C. D., *farmer*, of the parish of , in the said district, by this his petition, respectfully represents:

That for about year , E. F., *farmer*, of the said parish of , (*uncle or brother of the petitioner, as the case may be,*) has been an habitual drunkard, and that by reason of his drunkenness he squanders *or* mis-manages his property, *or* places his family in trouble or distress, *or* transacts his business prejudicially to the interests of his family, of his relations, *or* of his creditors, and that, therefore, it is desirable that under the statute in such case made and provided, the said E. F. be interdicted as an habitual drunkard.

Wherefore, your petitioner prays that the interdiction of the said E. F., as an habitual drunkard, in accordance with the statute in such case made and provided, be pronounced.

B.

FORM OF AFFIDAVIT WHICH MUST ACCOMPANY THE PETITION PRAYING FOR THE INTERDICTION.

C. D., the petitioner named in the foregoing petition, being duly sworn upon the Holy Evangelists, doth depose and say: That the facts alleged in the foregoing petition are true, and that the said petition hath not been made through malice, nor with a view to oppress. And he hath (*declared himself to be unable to sign,*) or hath signed after the same hath been duly read to him.

Sworn before me, this
18
J. S. C. }

Digitized by Google

C.

JUDGE'S ORDER, ASSEMBLING A FAMILY COUNCIL TO PROCEED TO THE INTERDICTION.

Considering the foregoing petition and affidavit, let the relations, whether of blood or by affinity, and in default of such relations, the friends of the said E. F., in the said petition mentioned, appear before me in chambers, in the court house, in the *city* or *town*, &c., on the day of 18 , at o'clock in the noon, for the purpose of proceeding upon the said petition.

18 .

J. S. C.

Q. 33 Vict., cap. 26.

1. Section 3 of the said act is amended so as to read as follows:

"The interdiction of any person interdicted as an habitual drunkard, shall have the same effects as those conferred by the laws in force in this province, in the cases of interdiction of any person for prodigality."—Q. 42-43 Vict., cap. 28.

The Act intituled "An Act to amend the Act 33 Vict., chapter 26, "intituled An Act to provide for the interdiction and cure of habitual "drunkards," details the measures to be adopted by those desirous of keeping establishments for habitual drunkards, and prescribing rules for their maintenance. It also enacts upon what authority people may be confined therein, etc.—Q. 47 Vict., cap. 21.

326. Persons who commit acts of prodigality, which give reason to fear that they will dissipate the whole of their property, are also to be interdicted.—Pothier, *Personnes*, 625; Merlin, Rép., vo. *Interdiction*, §§ 1, 2, n. 1; 4 Pand. Franç., 636; 1 Maleville, 434; 2 Toullier, 1309; C. S. L. C., c. 78, s. 23. [I. 341.]

327. Every person has the right to demand the interdiction of any one related or allied to him, who is prodigal, mad, imbecile, or insane. Husband or wife, likewise, may demand the interdiction the one of the other.—Pothier, *Personnes*, 625; Merlin, Rép., vo. *Interdiction*, §§ 3, 4; Dict. de droit, vo. *Interdiction*, 58; C. N., 490. [I. 341.]

DECISIONS:—1. Une interdiction et la nomination d'un conseil, obtenues à la requête de l'interdit lui-même, sont de nul effet, quant à un créancier avec lequel l'interdit a contracté.—Q. B.—*De Chantal & De Chantal*, 2 L. C. R., p. 469.

2. L'époux, le parent ou l'allié de l'imbécile ou de celui qui est en démence peuvent seuls provoquer l'interdiction; tant qu'elle n'a pas été prononcée celui

Digitized by Google

qui y est sujet est à la tête de son patrimoine, et les tiers ne peuvent s'adresser qu'à lui.—CASAULT, J.—*D'Estimonville vs Tousignant*, 1 Q. L. R., p. 39.

3. Dorion, C. J., *loq.*:—" Nous croyons que l'article 327 C. C. doit être interprété de manière à permettre à toute personne intéressée, à défaut de parents " et alléis, de suggérer l'incapacité d'une personne dont les intérêts sont en péril " pour autoriser le tribunal du domicile de faire assembler des amis pour aviser " sur la nomination d'un curateur ; cela était permis avant le Code. "—Q. B.—*Clément & Francis*, 1 Q. B. R., pp. 348 & 349.

328. The demand for interdiction must be made before the proper court, or before one of the judges or the prothonotary of such court; it must contain a specification of the acts of imbecility, insanity, madness or prodigality. The applicant is obliged to prove these acts.—34 Geo. III, c. 6, s. 8; Vic. c. 44, s. 91; Pothier, *Personnes*, 625; Dict. de droit, *loc. cit.*; Nouv. Deniz., vo. *Curatelle*, 710; 2 Toullier, n. 1319; 1 Maleville, 435; 1 Gin., 355; C. N., 492, 493; C. S. L. C., c. 78, s. 23. [I. 343.]

DECISION:—An interdiction *pour cause de prodigalité* may be superseded by the court.— K. B.—*Ex parte Ducheneau*, 2 R. de L., 438.

329. The court, judge or prothonotary before whom the demand is made, orders a family council to be called, as in the case of tutorship, and takes its advice as to the state of the person whose interdiction is sought; but he who makes the demand cannot form part of the family council.—Pothier, *Personnes*, tit. 6, sec. 5, art. 1; Denizart, *Actes de notoriété*, 113; 1 Gin., 356; C. N., 494, 495; C. S. L. C., c. 78, s. 23. [I. 343.]

DECISION:—Le juge qui prononce l'interdiction n'est pas obligé de suivre la majorité des parents et amis convoqués pour donner leur avis sur la nomination d'un curateur, tel avis n'étant qu'un mode d'instruction pour assister le juge dans l'exercice de ses attributions.—K. B. *Dufaux vs Robillard*, 7 R. L., p. 470.

330. When the demand is made on account of imbecility, insanity or madness, the defendant must be interrogated by the judge attended by a clerk or assistant, or by the prothonotary; the examination is taken down in writing, and communicated to the family council.

These interrogatories are not required if the interdiction be sought on account of prodigality; but in this case, the defendant must be heard or have been summoned to appear.—*ff* L. 5, *De curatoribus furioso*; Denizart, *Acts de notoriété*, 113; 1 Bourjon, 77; Dict. de droit, vo. *Interdiction*, 58-9; C. N., 496; C. S. L. C., c. 78, s. 23. [I. 343.]

Digitized by Google

331. If the demand for interdiction be rejected, the court may, if circumstances require it appoint a judicial adviser to the defendant.—6 Merlin, Rép., vo. *Conseil judic.*, n. 1, p. 96; Dict. de Droit, vo. *Interdiction*, 58, 59; C. N., 499. [I. 343.]

332. If the interdiction be pronounced out of court, it is subject to revision by the court, on petition of the person interdicted or of any of his relations. The judgment of the court is also subject to appeal.—41 Geo. III, c. 7, s. 18. [I. 343.]

DECISION:—Qu'un juge en chambre n'a pas juridiction pour s'enquérir d'une interdiction prononcée par le protonotaire de la Cour Supérieure, et que toute requête en destitution de curatelle ou en révision de l'interdiction prononcée hors de Cour, doit être portée devant la Cour Supérieure. Qu'il y a également appel d'un jugement en chambre, accordant l'interdiction demandée, lorsque la partie ou quelqu'un de ses parents en a demandé la révision à la Cour Supérieure, cet appel étant expressément permis chaque fois que l'interdiction est prononcée hôrs de Cour.—Q. B.—*Clément & Francis*, 1 Q. B. R., p. 346, 5 L. N., p. 301.

333. Every sentence or judgment of interdiction or for the appointment of an adviser is, at the instance of the applicant, notified to the defendant, and inscribed without delay by the prothonotary or clerk on the roll kept for that purpose, and publicly exposed in the office of each of the courts having power to interdict in the district.—Dict. de Droit, vo. *Interdiction*, 59; 1 Bourjon, 79; Denizart, *Actes de Notoriété*, 115; C. N., 501. [I. 345.]

DECISION:—Que le curateur à un interdit n'est pas tenu de faire enrégistrer la curatelle de cet interdit pour ester en justice en cette qualité. Que la loi ne requiert pas un tel enrégistrement.—PAPINEAU, J.—*Symes vs Farmer*, 16 R-L, p. 297.

334. Interdiction or the appointment of an adviser takes effect from the day of the judgment, notwithstanding the appeal.

All acts done subsequently by the person interdicted for imbecility, madness or insanity are null; the acts done by any one to whom an adviser has been given, without the assistance of such adviser are null, if injurious to him, in the same manner as those of minors and of persons interdicted for prodigality, according to article 987.—Dict. de Droit, vo. *Interdiction*, 58-9; Pothier, *Oblig.*, n. 51; *Donations entrevifs*, sec. 1, art. 1; Guyot, Rép., vo. *Interdiction*, 443, 450; C. N., 502. [I. 345.]

DECISIONS:—1. A party to whom a curator has been appointed cannot bind himself by contract whilst the curatorship is existing.—C. R.—*Emerick vs Patterson*, 7 L. C. R., p. 239.

Digitized by Google

2. Que le créancier a un droit d'action contre le curateur *ès-qualité* à un interdit pour les choses nécessaires à la vie qu'il aurait vendues personnellement à l'interdit sans l'assistance du curateur.—MATHIEU, J.—*Valade vs Levy*, 10 L. N., p. 350.

335. Acts anterior to interdiction for imbecility, insanity or madness may nevertheless be set aside, if the cause of such interdiction notoriously existed at the time when these acts were done.—1 Bourjon, 76, nn. 8, 9, 10, 11 ; 1 Ricard, *Donations*, part. 1, c. 3, sec. 3, n. 146 ; 2 Augeard, 96, *Arrêt du 2 avril* 1708 ; C. N., 503. [I. 345.]

DECISIONS :—1. La démence et l'imbécilité notoires ne rendent pas, avant l'interdiction, les actes de celui qui en souffre nuls ; elles ne les font qu'annulables pour lésion. L'imbécile et celui qui est en démence jouissent de leurs droits tant qu'ils ne sont pas interdits, et ils peuvent valablement les invoquer en justice, et traduits là par eux les tiers peuvent valablement s'y défendre.—CASAULT, J.—*D'Estimauville vs Tousignant*, 1 Q. L. R., p. 39.

2. In the present case there was nothing to show that the act sought to be set aside, which was done some months before the interdiction of the grantor, should be annuled.—Q. B.—*Bouvier & Collette*, 31 L. C. J., p. 14.—CIMON, J.—14 R L., p. 97.

3. The incapacity arising from insanity only begins from the date of the interdiction and that, up to that time the interdict remains, as regards third persons, at the head of his patrimony and preserves the gestion thereof, and third persons, not having quality to demand the interdiction, are entitled to serve all necessary notices and significations on the interdict prior to his actual interdiction.—JETTÉ, J.—*Symes vs. Farmer*, 27 L. C. J., p. 185.

4. Que l'interdiction d'une personne comme ivrogne d'habitude a les mêmes effets que l'interdiction pour prodigalité, et notamment, un contrat fait par un ivrogne avant son interdiction est valide comme le serait celui d'un prodigue dans les mêmes circonstances.—TELLIER, J.—*Métayer vs McVey*, M. L. R., 4 S. C., p. 21.

★ **336.** Interdiction ceases with the causes which necessitated it. Nevertheless it cannot be removed without observing the formalities prescribed for obtaining it, and the interdicted person cannot resume the exercise of his rights until after the judgment removing the interdiction.—Pothier, *Personnes*, 625-6 ; 1 Bourjon, 77-8 ; Nouv. Deniz., vo. *Curatelle*, p. 716 ; Guyot, Rép., vo. *Interdiction*, 450 ; C. N., 512. [I. 345.]

CHAPTER THIRD.

OF CURATORSHIP.

337. There are two sorts of curatorship, one to the person, the other to property.—Pothier, *Personnes*, 628 ; N. Deniz., 716-7. [I. 345.]

Digitized by Google

338. The persons to whom curators are given are :

1. Emancipated minors ;

2. Interdicted persons ;

3. Children conceived but not yet born.—Pothier, *loc. cit.* ; 5 N. Deniz., 706 ; 1 Id., 64 ; Bretonnier, Quest. de droit, vo. *Absent*, c. 111. [I. 345.]

See amendments noted at C. C. 325, respecting interdiction of drunkards.

★ **339.** Curators to the person are appointed with the formalities and according to the rules prescribed for the appointment of tutors. They are sworn before entering upon their duties.—N. Deniz., *loc. cit.* ; Pothier, *loc. cit.* [I. 345.]

DECISION :—Le père de l'interdit a le droit d'être nommé son curateur de préférence à un étranger.—Q. B.—*Dufaux & Robillard*, 7 R. L., p. 470.

340. A curator to an emancipated minor has no control over his person ; he is given in order to assist him in matters and proceedings in which he cannot act alone. This curatorship ends with the minority.—Pothier, 626 ; 5 N. Deniz., 701. [I. 345.]

341. A curator to an interdicted person is appointed by the judgment which pronounces the interdiction.—Dict. de Droit., vo. *Interdiction*, p. 58 ; 5 N. Deniz., p. 708, § 5 ; Pothier, 625. [I. 345.]

DECISION :—Qu'un curateur peut être nommé pour prendre soin de la personne et des biens d'un individu frappé de paralysie et incapable de faire ses affaires, sans qu'il soit nécessaire de prononcer l'interdiction.—MATHIEU, J.—*Exparte, George Bury*, 13 R. L., p. 477.

342. The husband, unless there are valid reasons to the contrary, must be appointed curator to his interdicted wife. The wife may be curatrix to her husband.—Guyot, Rép., vo. *Interdiction*, 442 ; 15 Merlin, p. 403 ; Meslé, 365 ; 1 Bourjon, 77 ; 2 Pigeau, 83 ; Actes de Notoriété. 115 ; 4 Pand. Franç., 653. [I. 347.]

★ **343.** The curator to a person interdicted for imbecility, insanity or madness has over such person and his property all the powers of the tutor over the person and property of a minor ; and he is bound towards him in the same manner as the tutor is towards his pupil.—

These powers and obligations extend only to the property, when the interdiction is for prodigality.—Actes de Notoriété, 115 ; Lamoignon, tit. 4, art. 137 ; Pothier, 626 ; *Ibid., Propriété*, n. 7 ; *Succes-*

Digitized by Google

sions, c. 3, sec. 3, art. 1, § 3; *Intr.* au tit. 17, *Cout. d'Orl.*, n. 40. [I. 347.]

See the amendments to C. C. 297.

DECISIONS:—1. A curator to an interdicted person may be removed by his consent and the consent of the *parents*, or upon petition by the next of kin, on sufficient cause and on *avis de parents*, without his consent.—K. B.—*Côté vs Pageot*, 2 R. de L., p. 438.

2. The appointment of a wife as curatrix to her interdicted husband necessarily contains the authorization to administer the estate of her husband as well as her own.—TASCHEREAU, J.—*Le Mesurier vs Leahy*, 14 L. C. R., p. 417.

3. The curator to a lunatic or insane person cannot remove him from his domicile to an hospital or asylum without the authority of the court, acting on the advice of his relations or friends.—DORION, C. J.—*Ex parte Cahill*, 18 L. C. J., p. 270.

4. The curator to a person voluntarily interdicted, must be brought into the proceedings to obtain *contrainte* for *folle enchère*, though the *folle enchère* was made before interdiction.—Q. B.—*Ex parte Fourquin*, 3 L. C. L. J., p. 118.

5. The wife who has been appointed curatrix to her husband who had been interdicted for drunkenness, can be sued alone; her husband need not be put *en cause* nor need she be specially authorized for that purpose.—TASCHEREAU, J.—*Lemieux vs Forcade*, 2 R. L., p. 626.

6. Le curateur à l'interdit pour démence n'a pas le droit d'enlever l'interdit à son épouse et à sa famille, pour le placer dans un hôpital.—DORION, C. J.—*Moore vs O'Neil*, 5 R. L., p. 646.

7. The appointment as curator to an interdicted person of a party residing in Ontario is illegal, and will be annulled and set aside in a suit *en destitution* by a daughter of the interdict, even if she be not dependant on her father for support, and a new curator, resident within this Province, will be ordered to be appointed in due course of law.—MACKAY, J.—*Legge vs Legge*, 24 L. C. J., p. 83, 3 L. N., p. 159.

8. Que le curateur à l'interdit peut, sur requête sommaire présentée par le beau frère de l'interdit, être condamné à fournir un compte sommaire de sa gestion. (C. C. 309.)—MATHIEU, J.—*Robillard vs Laramée*, 13 R. L., p. 668.

9. The curator of a person interdicted cannot appeal from a judgment until he is authorized to do so by the judge or prothonotary on the advice of a family council. (C. C. 309.)—Q. B.—*Clément & Francis*, 6 L. N., p. 325.

344. [No one, with the exception of husband and wife, and ascendants and descendants, is obliged to retain the curatorship of an interdicted person for more than ten years; at the expiration of that time, the curator may demand and has a right to be replaced.]—C. N., 508. [I. 347.]

345. The curator to a child conceived but not yet born, is bound to act for such child whenever its interests require it; he has

Digitized by Google

until its birth the administration of the property which is to belong to it, and afterwards he is bound to render an account of such administration.—Pothier, *Des personnes*, 627; 5 N. Deniz., 717; 2 Toullier, p. 315; C. N., 393. [I. 347.]

346. If during the curatorship, the party subjected to it have any interests to discuss with his curator, such party is given, for that case, a curator *ad hoc*, whose powers only extend to the matters to be discussed.—5 N. Deniz., p. 701. [I. 347.]

DECISIONS:—1. L'on peut émaner un bref de tiers saisie contre le curateur d'un interdit, pour l'obliger à payer au demandeur le montant qu'il doit personnellement à l'interdit, pour un jugement rendu contre l'interdit et le dit curateur, en sa dite qualité.—LORANGER, J.—*Crebassa vs Fourquin*, 3 R. L., p. 57.

2. La tiers-saisie, émanée à la poursuite d'un créancier, pour saisir et arrêter, entre les mains du tuteur personnellement, toutes les sommes d'argent qu'il peut devoir au tuteur, est nulle et illégale, vu que le compte du tiers-saisi, comme tuteur, ne peut être débattu par la contestation de la déclaration sur saisie-arrêt, mais ne doit l'être que par une contestation directe avec la partie intéressée.—Q. B.—*Dorion & Dumont*, 3 R. L., p. 60.

★ **347.** Curators to property are those appointed:

1. To the property of absentees;
2. In cases of substitution;
3. To vacant estates;
4. To the property of extinct corporation;
5. To property abandoned by arrested or imprisoned debtors or on account of hypothecs;
6. To property accepted under benefit of inventory,—5 N. Deniz., 700; Pothier, 628. [I. 347.]

348. The provisions relating to curators to the property of absentees are contained in the title *Of Absentees*. Those concerning curators to the property of extinct corporations, in the title *Of Corporations*. In the third book and in the Code of Civil Procedure are to be found the rules touching the appointment, powers and duties of the other curators mentioned in the preceding article, who must also be sworn. [I. 347.]

CHAPTER FOURTH.

OF JUDICIAL ADVISERS.

349. A judicial adviser is given to those who, without being absolutely insane or prodigal, are nevertheless of weak intellect, or

Digitized by Google

so inclined to prodigality as to give reason to fear that they will dissipate their property or seriously impair their fortune.—Dict. de Droit, vo. *Conseil*, 397 ; vo. *Interdit*, 58-9 ; Anc. Deniz., vo. *Conseil*, 624 ; Guyot, Rép., vo. *Interdiction*, 436 ; C. N., 513, 514. [I. 347.]

350. Judicial advisers are given by those who have power to interdict, on the demand of any person who has a right to demand interdiction, and with the same formalities. Such demand may also be made by the party himself.—Dict. de Droit, vo. *Conseil*, 397 ; vo. *Interdiction*, 59, 60, Anc. Deniz., vo. *Conseil*, 625, n. 7 ; Nouv. Deniz., vo. *Conseil judiciaire*, § 2, p. 254 ; C. N., 514. [I. 348.]

351. If the powers of the judicial adviser be not defined by the judgment, the person to whom he is appointed is prohibited from pleading, transacting, borrowing, receiving moveable capital and giving a discharge therefor, as also from alienating or hypothecating his property without the assistance of such adviser.

The prohibition can only be removed in the same manner that the appointment has been made.—Pothier, *Personnes*, 626 ; 1 Bourjon, 80 ; Dic. de Droit, vo. *Conseil*, 397 ; Anc. Deniz., vo. *Conseil*, 624-5 ; Nouv. Deniz., vo. *Conseil judiciaire*, § 2, pp. 254 et seq. ; C. N., 513, [I. 349.]

DECISIONS:—1. A judgment obtained against a person interdicted by reason of insanity, his curator not being a party to the suit, is null *de plein droit*. —K. B.—*Sproat vs Chandler*, 3 R. de L., p. 390.

2. Where a person to whom a judicial adviser had been appointed carried on business as a grocer, and signed a promissory note, without the assistance of his adviser, for goods sold and delivered to him, and such act was not beyond the limits of the appointment of the adviser, the note was valid.—TORRANCE, J.—*Delisle vs Valade*, 21 L. C. J., p. 250.

3. Where a person had expressed an intention to make a particular donation and subsequently, while afflicted with softening of the brain and of feeble intelligence, he made the donation with the assistance of a judicial counsel, the donation was valid.—Q. B.—*Brault & Brault*, 1 L. N., p. 495.

Digitized by Google

TITLE ELEVENTH.

OF CORPORATIONS.

CHAPTER FIRST.

OF THE NATURE AND CREATION OF CORPORATIONS, AND OF THEIR DIFFERENT KINDS.

352. Every corporation legally constituted is an artificial or ideal person, whose existence and succession are perpetual, or sometimes for a fixed period only, and which is capable of enjoying certain rights and liable to certain obligations.—Pothier, *Personnes*, 628 ; Nouv. Deniz., vo. *Corps*, 581 ; 3 Blackstone, 467. [I. 349.]

DECISION :—1. Des souscriptions à un fonds social ou stock, obtenues par surprise, fraude et par de faux états des affaires de la compagnie faits par ses officiers et ses directeurs, sont nulles et ne produisent aucune obligation. Les actionnaires ainsi trompés peuvent même recouvrer ce qu'ils ont payé en à-compte de leurs parts.—BEAUDRY, J.—*Glen Brick Co. vs Shackwell*, 1 R. C., p. 121.

2. G. et O., deux des principaux officiers de la demanderesse, souscrivent au capital-action de cette dernière, le premier pour $20,000 et le second pour $30,000. Subséquemment, G. altère sa souscription et la réduit à $10,000 et O. à $5,000, sans le consentement des souscripteurs subséquents. La compagnie acquiesce à telle réduction et ne fait appel de versement que sur les souscriptions telles que réduites. *Jugé*, que telle réduction ne pouvait pas être faite légalement sans le consentement des souscripteurs subséquents.—Et le défendeur ayant souscrit à des actions dans le capital de la demanderesse sans avoir jamais consenti aux altération et réduction de souscription ci-dessus mentionnées ; *Jugé*, que la demanderesse n'avait pas d'action contre lui pour le forcer à payer des versements sur sa souscription.—*National Ins. Co. & Hatton*, Montréal, 8 juillet 1878. —(De Bellefeuille's Code Annoté, p. 83.)

3. In appeal, this judgment was reversed, the Court not differing from the principle that the call must be equal, but holding, on the evidence that the respondent had failed to prove that the calls made by the company, appellants, were either illegal, partial or unjust.—Q. B.—*National Insurance Co. & Hatton*, 2 *L.N.*, p. 238, 24 L. C. J., p. 26.

See also cases noted at C. C. 1053 under the heading of " Damages arising from false statements *re* Companies."

353. Corporations are constituted by act of parliament, by royal charter or by prescription.

Digitized by Google

Those corporations also are reputed to be legally constituted which existed at the time of the cession of the country and which have been since continued and recognized by competent authority.—2 Vict., c. 26 ; C. S. L. C., c. 19. [I. 349.]

DECISIONS :—1. If a corporation, to be composed of certain trustees to be subsequently named by the Crown, be established by statute, the existence of the corporation will commence at the time when the statute was passed and not when the trustees are named.—COURT OF APPEALS.—*Royal Institution for the Advancement of Learning & Desrivières*, Stuart's Rep., p. 224.

2. The declaration of the King of France which requires a licence in mortmain, in certain cases, is repealed by the Prov. Stat. 41 Geo. III, c. 17, so far as respects the Royal Institution for the Advancement of Learning.—COURT OF APPEALS.—*Desrivières & Richardson*, Stuart's Rep., p. 218.

3. A subscription of shares in a company to be formed is not binding.—Q.B. —*Rascony & Union Navigation Co.*, 1 L. N., 494.

354. Corporations are aggregate or sole.

Corporations aggregate are those composed of several members ; corporations sole are those consisting of a single individual.—1 Blackstone, 469 ; 1 Wharton's *Law Lexicon*, 219 ; Grant, *On Corporations* 6 ; 5 Nouv. Deniz., 581 ; 1 Lorieux, 485-6. [I. 349.]

355. Corporations are either ecclesiastical or religious, or they are lay or secular.

Ecclesiastical corporations are aggregate or sole. They are all public.

Secular corporations are either aggregate or sole. They are either public or private.—Grant, 9 ; 1 Blackstone, 470 ; 1 Wharton's L. L., 219 ; Dunod., 2e part., 8 ; Pothier, *Prescription*, 142, 191 ; 2 Vict., c. 26 ; Acte de 1856, c. 103. [I. 349.]

356. Secular corporations are further divided into political and civil ; those that are political are governed by the public law, and only fall within the control of the civil law in their relations, in certain respects, to individual members of society.

Civil corporations constituting, by the fact of their incorporation, ideal or artificial persons, are as such governed by the laws affecting individuals ; saving the privileges they enjoy and the disabilities they are subjected to.—1 Blackstone, 41 et seq. ; 1 Pand. Franç., 365 ; 1 Duranton, 17 ; 1 Marcadé, 19. [I. 349 to 351.]

DECISIONS:—1. The defendant was a mere trading corporation incorporated for commercial purposes, with perfect freedom of acquisition and alienation of its property, and the fact that its existence and succession was continuous and

Digitized by Google

perpetual did not make it a corporation holding in mortmain. (See C. C. 366, case n. 1.)—Q. B.—*Kierzkowski vs Grand Trunk Ry*, 10 L. C. R., p. 47.—C. R.—4 L. C. J., p. 86 8 L. C. R., p. 3.

2. Une corporation civile est responsable d'un libelle qui lui est imputé par le demandeur. Telle corporation est régie en matières civiles par le droit commun et est soumise aux dispositions de l'article 356 du code civil.—BEAUDRY, J.—*Brown vs Cité de Montréal*, 17 L. C. J., p. 46.

3. Rights of individuals against a corporation are governed by the French law, and according to that law a corporation is liable for the damage caused by the assault and battery of one of its officers when on duty. In this cause two policemen had illegally arrested and ill treated a cab driver.—*Held*, that the corporation was liable in damages.—*City of Montreal vs Doolan*, R. C., p. 476.

4. Un corps municipal censurant la conduite des commissaires nommés dans une instance où il est partie, n'agit pas alors comme corps légiférant, mais bien comme corps administratif. Les corporations municipales sont régies, en matières civiles, par les règles qui régissent les corporations ordinaires, et sont soumises à l'art. 356 C. C. La corporation de Montréal est corporation politique, en autant qu'elle a droit de faire et promulguer des règlements ou lois de police, et corporation civile en tant qu'administrant les intérêts de ses habitants, et sous ce rapport soumise au droit commun. Comme corporation civile, elle est responsable comme tout autre individu, pour les actes de ceux qui sont autorisés à la représenter, et partant passible de poursuite pour délit.—BEAUDRY, J.—*Brown vs Cité de Montréal*, 4 R. L., p. 7.

See also cases noted at C. C. 360 and 1053, under the heading of Slander & Libel and Damages Arising from False Arrest.

CHAPTER SECOND.

OF THE RIGHTS, PRIVILEGES, AND DISABILITIES OF CORPORATIONS.

SECTION I.—OF THE RIGHTS OF CORPORATIONS.

357. Every corporation has a corporate name, which is given to it at its creation or which has since been recognized and approved by competent authority.

Under such name the corporation is known and designated, sues and is sued, and does all its acts and exercises all the rights which belong to it.—3 Blackstone, 475; Arnold, *On Corporations*, 8; C. L., 423. [I. 351.]

DECISION:—That railways subsidized by the Province under the "Quebec Railway Act, 1869" are liable to seizure and sale by ordinary process of law.—C. R.—*Wason Manufacturing Company vs Levis & Kennebec Railway*, 7 Q. L. R., p. 330.

Digitized by Google

358. The rights which a corporation may exercise, besides those specially conferred by its title, or by the general laws applicable to its particular kind, are all those which are necessary to attain the object of its creation; thus it may acquire, alienate and possess property, sue and be sued, contract, incur obligations, and bind others in its favor.—Pothier, *Personnes*, 628; 5 Nouv. Deniz., 597; 3 Blackstone, 475–6; 1 Ferrière, *Dict. de Droit*, 441: 2 Vict., c. 26: Wicksteed, Index to Statutes, 126: C. L., 424. [I. 351.]

DECISIONS:—1. Une corporation établie en pays étranger peut poursuivre dans le Bas-Canada, le recouvrement de ce qui lui est dû.—Q. B.—*Larocque & Franklin County Bank*, 8 L. C. R., p. 328.

2. Les compagnies incorporées sous l'acte de la législature de Québec, 31 Vict., ch. 25, n'ont pas le pouvoir d'émettre des billets promissoires, à moins que ce pouvoir ne soit formellement donné par les règlements de la compagnie.—Beaudry, J.—*Coates vs Glen Brick Co.*, I R. C., p. 121.

3. Les corporations municipales peuvent transiger sur toutes réclamations en dommages ou autres, contre elles; elles sont liées par telles transactions et n'en peuvent être relevées que pour les mêmes raisons que peut invoquer tout majeur en possession de l'universalité de ses droits civils.—Sicotte, J.—*Bachand vs Corporation de St-Théodore d'Acton*, 2 R. L., p. 325.

4. An action for libel may be brought by one corporation against another corporation.—Johnson, J.—*Institut Canadien vs Nouveau-Monde*, 17 L. C. J., p. 297.

5. Une corporation charitable, comme les Sœurs de la Providence, ne viole pas sa charte en préparant et vendant une préparation médicinale.—Q. B.—*Kerry & Les Sœurs de l'Asile de la Providence*, I L. N., p. 472.

6. Une corporation étrangère incorporée et reconnue par les lois d'un pays étranger où elle tient le siége de ses opérations, peut valablement contracter dans cette province, y ester en justice et contraindre ceux qui ont contracté avec elle d'exécuter leurs engagements, tout comme une personne naturelle qui résiderait dans un pays étranger.—Q. B.—*Connecticut & Passumpsic Rivers Ry. Co. & Comstock*, I R. L., p. 589.

7. Where the power of making promissory notes or accepting Bills of Exchange is not expressly given to a municipal corporation it cannot be implied as necessary to accomplish any of the purposes for which such a corporation was created. A promissory note made by a municipal corporation to pay the amount of a judgment against the municipality is null, the legislature having empowered municipalities to raise money in a different manner.—C. R.—*Pacaud vs Corporation of Halifax South*, 17 L. C. R., p. 56.

8. A municipal corporation will be condemned to pay the amount of a promissory note, signed by the mayor and secretary-treasurer in the name of the corporation, when it is neither alleged nor proved that the note was given without lawful consideration.—Q. B.—*Corporation of the Township of Grantham & Couture*, 24 L. C. J., p. 105, 2 L. N., p. 350.

9. A negotiable promissory note made by a Building Society or other corporate body, not specially authorised by its charter to make promissory notes, is a promise held out to the public that it will pay the amount to the order of the

Digitized by Google

person named therein and will be held good as an acknowledgement of indebtedness, and the endorsee of such note may recover the amount thereof from the corporation, promissor, on the mere production of the note, in the absence of a plea denying the existence of the debt or that valid consideration was received by the Corporation. — Q. B. — *Société de Construction du Canada & Banque Nationale*, 24 L. C. J., p. 226, 3 L. N., p. 130.

10. That as the promissory note sued on purported to have been signed by the manager and president of the Company defendant, it was encumbent upon the Plaintiff, under the general issue, to prove that these persons were duly authorized to make the note especially in view of the provision of the act of incorporation of the Company respecting notes.— C. R.—*Delany vs St. Lawrence Steam Navigation Company*, 8 Q. L. R., p. 92.

11. In an action on a promissory note against the Company defendant, it was held that as the Company had not proved that the President, who signed the note, had not the power to do so, the Company was responsible for it.—C. R.—*Brice vs Morton Dairy Farming & Colonization Company*, 6 L. N., p. 171.

12. Que les corporations municipales n'ont pas le pouvoir de faire des billets promissoires ou d'accepter des lettres de change.—RAINVILLE, J.—*Martin vs Cité de Hull*, 10 R. L., p. 232.

13. Qu'un billet promissoire fait et signé par le président et trésorier d'une Compagnie d'assurance mutuelle et remis à un membre de la Compagnie en règlement d'une perte soufferte par ce dernier, peut être recouvré par un tiers à qui ce billet est transporté avant l'échéance, quand même les billets doivent être signés par les président et secrétaire.— C. R.—*Jones vs Compagnie d'Assurance Mutuelle contre le Feu des cantons de l'Est*, 15 R. L., p. 500, M. L. R., 3 S. C. p. 413.

359. For these objects, every corporation has the right to select from its members, officers whose number and denominations are determined by the instrument of its creation or by its by-laws or regulations.—Pothier, *Personnes*, 629; *Dict. de Droit, loc. cit.*; 3 Domat, tit. 15, sec. 2, n. 9; C. S. C., c. 5, s. 6, § 24. [I. 351.]

360. These officers represent the corporation in all acts, contracts or suits, and bind it in all matters which do not exceed the limits of the powers conferred on them. These powers are either determined by law, by the by-laws of the corporation, or by the nature of the duties imposed.—Pothier, *eod. loc.*; *Dict. de Droit, eod loc.*; C. L., p. 430. [I. 351].

DECISIONS:—1. The head of a corporation may bind the body corporate by any contract from which it may derive a benefit. — COURT OF APPEALS:—*Royal Institution for the Advancement of Learning & Desrivières*, Stuart's Rep., p. 224.

2. Corporations are bound by the acts of their agents in the same way and to the same extent as persons are.—COURT OF APPEALS:—*Ferrie & The Wardens of the House of Industry*, 1 R. de L., p. 27.

3. The clause of the statute 9 Vict., c. 27, s. 21; s. s. 3, which defines the powers and duties of School Commissioners as to building and repairing school

Digitized by Google

houses etc., contains this provision: " provided that no rate shall be levied for the building of a superior or model school to exceed the sum of £150." HELD :—That the obligation for building sued on being in excess of £150, for which sum only the municipality could be assessed and was inoperative to bind the defendants. Q. B.—*Adams & School Com. for Mun. of Barnton*, 11 L. C. R. p. 46.

4. Une corporation municipale est responsable des actes de ses officiers, si elle les a ordonnés ou si elle essaie de les justifier.—Q. B.—*Doyon & Corporation de la paroisse de Saint Joseph*, 17 L. C. J.. p. 193.

5. When the cashier of a Bank has entered into transactions, even in his own name, which are within the ordinary scope of the duties of such cashier, the Bank is bound by such transaction. Where the directors of a Bank allow an officer of the same to conduct its affairs as he sees fit, without reference to them, they render the Bank liable for his acts, which they are presumed to have authorized, and a plea that they were ignorant of such acts, will not be maintained. Where such directors permit a period of one year to elapse after they have obtained knowledge of an unauthorized act of an officer of such Bank, before they repudiate it, they are presumed to have acquiesced in it after the lapse of such period.— Q. B.—*Montreal City & District Savings Bank & Jacques Cartier Bank*, 30 L. C. J., p. 106.

But, held in the Privy Council, that acquiescence and ratification must be founded on a full knowledge of the facts and further it must be in relation to a transaction to which effect may be given thereby. When the accounts of a Bank in liquidation had been changed so as to represent the Bank as a debtor in respect of a sum which had been borrowed by its manager for his own purposes, the doctrine of acquiescence and ratification by the liquidating authorities would not avail to render the Bank liable to pay a debt which it never owed.—PRIVY COUNCIL.—*Jacques Cartier Bank & Montreal City & District Savings Bank*, 13 App. Cas. p. 111, 11 L. N., p. 66.

6. Unlawful acts of the managing director of a Company, designed to bring about the ruin of a co-partnership firm, do not bind the company or make it responsible for damages unless approved or ratified by the company.—DAVIDSON, J. —*Bury vs Corriveau Silk Mills Co.*, M. L. R., 3 S. C., p. 218.

7. Where a corporation has a knowledge of an act of its President and Secretary which they had not sufficient authority to transact, and it does not repudiate such act, the corporation will be bound by it.—Q. R.—*Société de Construction d'Hochelaga & Société de Construction Métropolitaine*, 4 Q. B. R., p. 199.

See also references to C. C. 1053, noted at C. C. 356.

361. Every corporation has a right to make, for its internal government, for the order of its proceedings and for the management of its affairs, by-laws and regulations which its members are bound to obey, provided they are legally and regularly passed.—Pothier, *eod loc.;* 5 Nouv. Deniz., 594 ; 3 Blackstone, 476 ; C. S. C., c. 5, s. 6, § 24 ; C. L., 430. [I. 351.]

DECISIONS :—1. A stockholder in a joint stock company can bring an action of account against the corporation, and thereby contest the validity of a by-law

Digitized by Google

made by a board of its directors.—K. B.—*Keys vs Quebec Fire Ins. Co.*, Stuart's Rep., p. 425.

2. Qu'une association incorporée est civilement responsable des actes illégaux que ses règlements prescrivent à ses membres.—CASAULT, J.—*Paradis vs Société des Ouvriers du Bord*, 13 Q. L. R., p. 101.

SECTION II.—OF THE PRIVILEGES OF CORPORATIONS.

362. Besides the special privileges which may be granted to each corporation by its title of creation or by special law, there are others which result from the fact of incorporation and which exist of right in favor of all corporate bodies, unless taken away, restrained or modified by such title or by law.—3 Blackstone, 475; C. S. C., *loc. cit.* [I. 351.]

363. The principal of these privileges is that which limits the responsibility of the members of a corporation to the interest which each possesses therein, and exempts them from all personal liability for the payment of obligations contracted by the corporation within the scope of its powers and with the formalities required.—Pothier, *Personnes*, 628-9; Dict. de Droit, *loc. cit.*, 5 Nouv. Deniz., 597; 3 Blackstone, 468; C. S. C., *loc. cit.* [I. 353.]

DECISIONS:—1. Les membres d'une corporation qui votent de bonne foi une résolution adoptée par la majorité, ne peuvent être responsables personnellement pour les décisions du corps dont ils font partie; quand même ces décisions seraient en contravention à un statut qui punit telle contravention d'une amende.—LORANGER, J.—*Audette dit Lapointe vs Duhamel*, 1 R. L., p. 52.

2. Un actionnaire ne peut refuser de payer le montant de sa mise, par le fait que la corporation aurait commis des actes illégaux et de nature à déprécier la valeur des actions: de telle griefs peuvent donner lieu à des actions de dommages contre la corporation ou les directeurs individuellement, mais ne peuvent opérer la résolution du contrat d'association.—Q. B.—*Connecticut & Passumpsic R. Ry. Co. & Comstock*, 1 R. L., p. 589.

SECTION III.—OF THE DISABILITIES OF CORPORATIONS.

364. Corporations are subject to particular disabilities which either prevent or restrain them from exercising certain rights, powers, privileges and functions, which natural persons may enjoy and exercise; these disabilities arise either from their corporate character or they are imposed by law.—3 Blackstone, 475; Pothier, *Personnes*, 630; Dict. de Droit, 441; Nouv. Deniz., 597. [I. 353.]

Digitized by Google

DECISIONS:—1. Qu'une compagnie ne peut pas, sans y être autorisée par sa charte, réduire son capital, ni racheter ses actions, ni accepter les remises que lui ont fait les actionnaires ; que toutes ces actions sont *ultra vives* et nulles, et ne libèrent pas les actionnaires de l'obligation de payer le montant de leurs actions.—CASAULT, J.—*Ross vs Fizet*, 8 Q. L. R., p. 251.

2. Similar decision.—Q. B.—*Ross & Dusablon*, 10 Q. L. R. p. 74.

3. Qu'en l'absence d'une règle contraire dans la loi qui crée une compagnie, dans les règlements qu'elle autorise ou dans un statut spécial qui l'affecte, la donation d'actions dans ses fonds n'est, pour valoir contre les tiers, soumise à aucune autre formalité que la donation de meubles corporels.—C. R.—*Whitehead vs McLaughlin* 8 Q. L. R., p. 373.

4. A municipal corporation cannot validly bind itself to make a by-law for the opening of a street, and no action will lie against such corporation for failure to carry out an agreement for the opening of a street.—Q. B.—*Brunette & Corporation du Village Cote Saint Louis*, M. L. R., 2 Q. B., p. 103.

5. That the directors of an incorporated Company, even when the act of incorporation authorises an increase of the capital, have not the right to order such increase, if it be proved, as in the present case, that the Company's bridge is in good order and has no need of repairs, if there be sufficient funds on hand, all debts paid, and if such increase be ordered simply to secure to the directors the control of the affairs of the Company.—Q. B.—*Perrault & Millot*, 12 Q. L R. p. 248.

6. Qu'une résolution adoptée par une assemblée des marguilliers anciens et nouveaux à l'effet d'indemniser un des fabriciens pour une perte subie dans un procès en dommages encouru pendant qu'il exerçait les fonctions de marguillier et dans l'exercice de ces dites fonctions, est illégal et *ultra vires*. Que cette résolution constitue une véritable donation, excède les pouvoirs de l'assemblée qui a adopté telle résolution. —Q. B.—*Curé et Marg. de l'Œuvre etc. de Saint Isidore & Perras*, 32 L. C. J., p. 176.

As to the power of corporations to make promissory notes, see cases noted at C. C. 358.

★ **365.** In consequence of the disabilities which arise from their corporate character, they can neither be tutors nor curators, saving the exception contained in chapter 34 of the Consolidated Statutes for Lower Canada, nor can they take part in meetings of family councils.

They cannot be entrusted with the execution of wills or any other administration which necessitates the taking of an oath, or imposes personal responsibility.

They cannot be summoned personally, nor appear in court otherwise than by attorney.

They cannot sue nor be sued for assault, battery or other violence on the person.

They cannot serve as witnesses nor as jurors before the courts.

They can neither be guardians nor judicial sequestrators, nor

Digitized by Google

can they be charged with any other functions or duties the exercise of which may entail imprisonment.—Pothier, *Personnes*, 628-9; 3 Blackstone, 476; Dict. de Droit, 441; 5 Nouv. Deniz,, 597. [I. 353.]

Amendment :—The commissioners appointed by the Governor for superintending the Hotel Dieu at Quebec, the General Hospital of the Grey Nuns at Montreal, the General Hospital at Quebec, or any institution receiving foundings in the district of Three Rivers, and their successors in office, shall be the legal guardians *(tuteurs)* of the foundlings in the institutions with reference to which they have been respectively appointed and shall have such powers as they would have, if appointed to be such guardians in the ordinary course of law.—C. S. L. C., cap. 34, s. 6.

DECISION :—*Semble*, a Bank cannot be an attorney.—SMITH, J.—*Lynch vs McLennan*, 9 L. C. R., p. 257.

★ **366.** The disabilities arising from the law are :

1. Those which are imposed on each corporation by its title, or by any law applicable to the class to which such corporation belongs;

2. Those comprised in the general laws of the country respecting mortmains and bodies corporate, prohibiting them from acquiring immoveable property or property so reputed, without the permission of the crown, except for certain purposes only, and to a fixed amount and value ;

3. Those which result from the same general laws imposing, for the alienation or hypothecation of immoveable property held in mortmain or belonging to corporate bodies, particular formalities, not required by the common law.—Pothier, *Des Personnes*, 630; 1 Ferrière, *loc. cit.;* 5 Nouv. Deniz., p. 597. [I. 351.]

Amendment :—Whereas there are in the Province of Quebec, a certain number of corporations acknowledged by law, which, by their charters, cannot acquire or hold real estate beyond a limited amount, and whereas the said corporations could employ their property to greater advantage, if they were permitted whether they dispose of them, [*sic.*] to apply the price received upon other real estate ; Therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows :

1. All corporations of this Province, which cannot acquire real estate but to a limited amount, under the provisions of their charters, or of the law, shall hereafter, have the right, whenever they dispose of or alienate any real estate belonging to them, to apply the price thereof to the acquisition of other real estate, and also to receive the

Digitized by Google

revenues whatever thereof, any law to the contrary notwithstanding and to employ the same to the objects for which they were constituted.—Q. 42-43 Vict., cap. 34.

DECISIONS:—1. The mortmain restrictions upon the acquisition of real estate by mortmain corporation were caused by the acquired property thereby becoming inalienable, not by the existence of the corporation being perpetual or continuous. These restrictions applied to corporations aggregate, the clergy in general, religious bodies, fraternities, municipal guilds, and others of like nature which form the class designated as mortmain corporations, *gens de mainmorte.* Modern civil corporations established for commercial and trading purposes, as joint stock or incorporated banking, manufacturing, railway companies, &c., cannot be included in such class nor do mortmain restrictions apply to them.—C. R.—*Kierkowski vs Grand Trunk Ry.*, 4 L. C. J., p. 86.—Q. B., 10 L. C. R., p. 47.

2. A subscription note given to a municipal corporation, to aid in the erection of a public market, is not a contract or agreement contrary to good morals. Such contract or agreement is one that the parties might lawfully make, and is not beyond the powers of a corporate body.—RAMSAY, J.—*Corporation of Waterloo vs Girard*, 16 L. C. J., p. 106.

3. By the laws of the province of Quebec corporations are under a disability to acquire lands without the permission of the Crown or authority of the legislature. A foreign corporation which had purchased lands in the said province without such permission or authority, and was evicted, had no action of damages against the vendor of their vendor.—*Chaudière Gold Mining Co. & Desbarats*, 17 L. C. J., p. 275, 13 L. C. J., p. 132, 15 L. C. J., p. 44.

4. Les corporations, quelles qu'elles soient, qui n'ont pas obtenu de la législature un pouvoir spécial à cette fin, ne peuvent acquérir des biens immeubles dans cette province. Tous les actes faits par telles corporations aux fins d'acquérir des immeubles comme susdit, sont absolument nuls et de nulle valeur et ne peuvent conférer aucun droit quelconque.—TORRANCE, J.—*La Cie des mines d'or de la Chaudière vs Desbarats*, 1 R. L., p. 82.

5. That the provisions of C. C. 364 and 366, are general and apply to all corporations without distinction ; and therefore, a Building Society, incorporated by the Dominion Parliament, to carry on operations throughout the Dominion, is subject to the disabilities imposed by C. C. 366, and cannot acquire immoveable property in the Province of Quebec, without the permission of the Crown.—LORANGER, J.—*Cooper vs McIndoe*, M. L. R., 2 S. C., p. 388. Confirmed in Q. B., 15 R. L., 276, 32 L. C. J., p. 210.

367. All corporations are prohibited from carrying on the business of banking unless they have been specially authorized to do so by their title of creation.—C. S. C., c. 5, s. 6,§ 24. [I. 353.]

Digitized by Google

CHAPTER THIRD.

OF THE DISSOLUTION OF CORPORATIONS AND THE LIQUIDATION OF THEIR AFFAIRS.

SECTION I.—OF THE DISSOLUTION OF CORPORATIONS.

★ **368.** Corporations are dissolved :

1. By any act of the legislature declaring their dissolution ;

2. By the expiration of the term or the accomplishment of the object for which they were formed, or the happening of the condition attached to their creation ;

3. By forfeiture legally incurred ;

4. By the natural death of all the members, the diminution of their number, or by any other cause of a nature to interrupt the corporate existence, when the right of succession is not provided for in such cases ;

5. By the mutual consent of all the members, subject to the modifications and under the circumstances hereinafter determined.—1 Blackstone, 484 ; C. S. L. C., c. 88, s. 10.

Amendment.—See the Act intituled : " An Act respecting the Voluntary Winding up of joint stock Companies. " Q. 42–43 Vict., cap. 31.

DECISION :—La Compagnie du Chemin de Fer Montréal, Ottawa et Occidental, ne pouvait se dissoudre sans l'autorisation du Parlement du Canada.—PRIVY COUNCIL.—*Bourgoin & Montreal, Ottawa & Occidental Ry. Co.*, 24 L. C. J., p. 193 ; 3 L. N., p. 185 ; 5 App. Cas., p. 382 ; R. A. C., p. 874.

369. Ecclesiastical and secular corporations of a public nature, other than those formed for the mutual assistance of their members, cannot be dissolved by mutual consent without a formal and legal surrender or the authority of the legislature, as the case may be.

The same rule applies to banks, to railway, canal, telegraph, toll-bridge, and turnpike companies, and generally to private corporations who have obtained privileges which are exclusive or exceed those resulting by law from incorporation. — C. C. 13 ; L. 38, *ff de pactis* ; L. 45, *de reg. jur.* ; L. 6, Cod., *de pactis.* [I. 355.]

370. Public corporations formed for the mutual assistance of their members, and those of a private nature not included in the

Digitized by Google

preceding article, may be dissolved by mutual consent, on conforming to the conditions which may have been specially imposed on them, and saving the rights of third parties.—(Rule that private rights may be waived.) — L. 7 §7, *ff de pactis*; L. 29, Cod., *eod. tit.* [I. 355.]

SECTION II.—OF THE LIQUIDATION OF THE AFFAIRS OF DISSOLVED CORPORATIONS.

★ **371.** A dissolved corporation is, for the liquidation of its affairs, in the same position as a vacant succession. The creditors and others interested have the same recourse against the property which belonged to it, as may be exercised against vacant successions and the property belonging to them. [I. 355.]

Amendment:—See amendment to C. C. 368, which affects this whole section.

DECISIONS:—1. A joint company having ceased to do business, its directors having resigned and its place of business having been burned down, the shareholders, at a duly convened general meeting, named the secretary-treasurer assignee, assisted by a council of advisers composed of three of the late directors with full power to wind up the affairs of the company: *Held*, that such an organization could not receive the sanction of the court, and an action brought by such assignee in the name of the company in liquidation would be dismissed.—MEREDITH, C. J.—*Quebec Agricultural Implements Co., vs Hébert*, I Q. L. R., p. 363.

2. Dans une action intentée par une compagnie à fonds social contre un actionnaire pour le montant d'une part souscrite et non payée, sur preuve que les directeurs et officiers de la compagnie ont donné leur démission et n'ont pas été remplacés, la cour, nonobstant la sec. 20 de la 31e Vict., c. 25, ordonnera que la compagnie procède à l'élection de nouveaux officiers, ou d'un curateur suivant l'art. 371 du C. C., et en produise acte, avant de pouvoir procéder ultérieurement dans la cause.—Frais réservés.—TESSIER, J.—*La Cie d'instruments agricoles vs Hébert*, 2 Q. L. R., p. 182.

372. In order to facilitate such recourse, a curator, who represents such corporation and is seized of the property which belonged to it, is appointed by the proper court, with the formalities observed in the case of vacant estates.—C. S. L. C., c. 88, s. 10. [I. 355.]

DECISION:—A judge in chambers has no jurisdiction to appoint a curator to a dissolved corporation until its dissolution has been judicially pronounced in due course of law.—TORRANCE, J.—*Montreal Patent Guano Co., vs Maude*, 18 L. C. J., p. 129.

★ **373.** Such curator must be sworn; he must give security and make an inventory. He must also dispose of the moveables, and must proceed to the sale of the immoveable property, and to the

Digitized by Google

distribution of the price between the creditors and others entitled to it, in the manner prescribed for the discussion, distribution and division of the property of vacant estates to which a curator has been appointed, and in the cases and with the formalities required by the Code of Civil Procedure.—C. S. L. C., c. 88, s. 10. [I. 357.]

BOOK SECOND.

OF PROPERTY, OF OWNERSHIP AND OF ITS DIFFERENT MODIFICATIONS.

TITLE FIRST.

OF THE DISTINCTION OF THINGS.

374. All property, incorporeal as well as corporeal, is moveable or immoveable.—Paris, 88; 2 Du Parc Poullain, p. 55; Arrêtés de Lamoignon, 2e part., tit. 8, art. 1; Pothier, *Com.*, 27, 66; *Ibid.*, *Intr. gén. aux Cout.*, 45; 3 Toullier, pp. 4, 5; 5 Pand. Franç., 35; C. N., 516. [I. 445.]

CHAPTER FIRST.

OF IMMOVEABLES.

375. Property is immoveable either by its nature, or by its destination, or by reason of the object to which it is attached, or lastly by determination of law.—Pothier, *Intr. Cout.*, 49; *Ibid.*, *Des choses*, pp. 638, 642; Lamoignon, tit. 8, art. 1, p. 46; 2 Marcadé, n. 340, p. 327; 9 Demolombe, nn. 93 et seq.; 2 Boileux, p. 595; 2 Maleville, pp. 5, 6; 2 Marcadé, n. 340, pp. 327-8, n. 371, p. 364; 9 Demolombe, pp. 40, 41, n. 94, & pp. 248, 249, nn. 378 et seq.; 2 Boileux, p. 619, sur art. 526; C. N., 517; C. L., 454. [I. 445.]

DECISIONS:—1. Une bâtisse ou autres améliorations faites sur le terrain d'autrui peut, par enregistrement, être hypothéquée.—C. R.—*Prud'homme vs Scott*, 30 L. C. J. p. 155.

2. But see case noted at C. C. 379 & 417.—Q. B.—*Boyd & Wilson*, 3 Q. B. R. p. 273.

Digitized by Google

376. Lands and buildings are immoveable by their nature.—Pothier, *Des choses*, 638; *Ibid., Intr. aux Cout.*, n. 47; Lamoignon, tit. 8, art. 1, p. 47; 3 Toullier, p. 8; 2 Du Parc. Poullain, p. 63; Institutes, *De rerum divisione, lib.* 2, tit. 1, § 30; C. N. 518; C. L., 455. [I. 445.]

377. Windmills and water-mills, built on piles and forming part of the building, are also immoveable by their nature when they are constructed for a permanency.—Paris, 90; Pothier, *Com.*, nn. 36, 37; *Ibid., Des choses*, pp. 638-9; *Ibid., Intr. aux Cout.*, n. 47; 2 Boileux, p. 600, sur art. 519; 2 Marcadé, pp. 328-9; C. N., 519. [I. 445.]

378. Crops uncut and fruits unplucked are also immoveable. According as grain is cut and as fruit is plucked, they become moveable in so far as regards the portion cut or plucked. The same rule applies to trees; they are immoveable so long as they are attached to the ground by their roots and they become moveable as soon as they are felled.—Paris, 92; *ff.* L. 44, *De rei vindicatione;* L. 25, § 6, *Quæ in fraudem creditorum;* Lamoignon, tit. 8, art. 19; Pothier, *Com.*, n. 45; *Dès choses*, p. 640; 3 Toullier, p. 8; 5 Pand. Franç., pp. 40 et seq.; C. N., 520. [I. 445.]

DECISION:—The sale of a government timber limit is the sale of an immoveable.—Q. B.—*Watson & Perkin*, 18 L. C. J., p. 261.

379. Moveable things which a proprietor has placed on his real property for a permanency or which he has incorporated therewith, are immoveable by their destination so long as they remain there.

Thus, within these restrictions, the following and other like objects are immoveable:

1. Presses, boilers, stills, vats and tuns;

2. All utensils necessary for working forges, paper-mills and other manufactories.

Manure, and the straw and other substances intended for manure, are likewise immoveable by destination.—*ff.* L. 15, *De actionibus empti;* 1 Bourjon, 143; 3 Toullier, pp. 12, 14; C. N., 523; upon § 3—2 Du Parc Poullain, pp. 65-6, nn. 8, 9; Paris, 90; Pothier, *Com.*, nn. 50 to 52; *Ibid., Des choses*, pp. 638 et seq.; upon § 4—Pothier, *Com.*, nn. 47 et seq.; *Ibid., Des choses, loc. cit.;* 2 Du Parc Poullain, p. 66, nn. 10 et seq.; 5 Pand. Franç., pp. 66-7; 2 Maleville, p. 10; upon § 5—Pothier, *Com.*, n. 40: *Ibid., Des choses*, p. 639; *ff.* L. 17, *De actionibus empti, etc.:* upon § 1—Paris, 90; Pothier, *Com.*, 47 et seq.;

Digitized by Google

Ibid., Des choses, p. 641 ; 5 Pand. Franç., pp. 68-9 ; 2 Du Parc Poullain, p. 66, nn. 10, 11 ; Dard. sur art. 524, p. 112 ; Fenet-Pothier sur art. 524, p. 123 ; C. N., 524.—[I. 445 to 447.]

DECISIONS:—1. The right of property in manure lying on a lot of land at the date of sale passes by the sale of the land, and manure made subsequently will be held to have passed also to the vendee, the vendor setting up no title and offering no justification, but pleading by denegation to the action of the vendee brought to recover damages for illegally removing the manure without his permission.—Q. B.—*Wyman & Edson*, 10 L. C. R., p. 17.

2. The rolling stock of a railway in Lower Canada is a part of its realty, being *immeuble par destination*, and as such is not liable to seizure under a writ of execution *de bonis*.—Q. B.—*Grand Trunk Ry. & Eastern Townships Bank*, 10 L. C. J., p. 11.

3. Les petits vaisseaux en fer-blanc (petites chaudières), employés en remplacement des auges, pour l'exploitation d'une sucrerie, sont meubles.—Berthelot, J.—*Lebrun vs Daoust*, 5 R. L., p. 475.

4. Qu'un orgue placé dans une église employé pour l'exercice du culte divin, devient immeuble par destination, comme y étant placé à perpétuelle demeure. —Papineau, J.—*Binks vs Rector of Trinity & Trust & Loan Company of Canada*, 25 L. C. J., p. 258, 4 L. N., p. 415.

5. The constituent parts of a steam engine, as well as other parts of the machinery put and fixed in a building by the *proprietor* of such building and the whole used as a steam-mill, form part of the *fonds*, and, in law, are *immeuble* and form part of the privilege of a hypothec.—Bourgeois, J.—*Philion vs Bisson*, 23 L. C. J., p. 32.

6. Que dans l'espèce le bouilloire et les mécanismes de la fromagerie dont il est question, sont choses mobilières et qu'elles appartiennent à celui qui a le titre le plus ancien et la possession. Dans l'espèce, la bâtisse dans laquelle se trouvait la machinerie était érigée dans une maison construite sur un terrain loué, et, par les conditions du bail, le locataire pouvait, à l'expiration d'icelui, déplacer la maison.—Q. B.—*Boyd & Wilson*, 3 Q. B. R., p. 273.—Belanger, J.—4 L. N., p. 365.

7. In this case 3000 railway sleepers, 1950 railway fastenings, cord-wood, intended for fuel of engines, and some office furniture were all held not to be *immeubles par destination*. (A long review of authorities).—C. R.—*Wyatt vs Levis & Kennebec Ry. Co.*, 6 Q. L R., p. 213.

8. Que des machineries placées dans une manufacture, pour l'exploitation de cette manufacture, quoiqu'immeuble par destination, doivent cependant, si elles sont vendues par autorité de justice, sur une saisie exécution mobilière, être considérées comme meubles, lorsqu'elles ont été enlevées de la manufacture. Que dans ce cas, une demande en nullité ou résiliation de cette adjudication et vente ne sera pas reçue contre l'adjudicataire.—Mathieu, J.—*Ville de Longueuil vs Crevier*, 14 R. L., p. 110.

380. Those things are considered as being attached for a permanency which are placed by the proprietor and fastened with iron and nails, imbedded in plaster, lime or cement, or which cannot be

Digitized by Google

removed without breakage, or without destroying or deteriorating that part of the property to which they are attached.

Mirrors, pictures and other ornaments are considered to have been placed permanently when without them the part of the room they cover would remain incomplete or imperfect.—Paris, 90; Pothier, *Com.*, 47 et seq., *Ibid., Des choses*, p. 641; Lamoignon, tit. 8, art. 6; 2 Du Parc Poullain, p. 66, n. 10; C. N., 525. [I. 447.]

381. Rights of emphyteusis, of usufruct of immoveable things, of use and habitation, servitudes, and rights or actions which tend to obtain possession of an immoveable, are immoveable by reason of the objects to which they are attached. — Pothier, *Com.*, 67; 2 Boileux, pp. 611 et seq.; 2 Marcadé, 342 et seq.; 9 Demolombe, nn. 529 et seq., nn. 490 et seq.; 2 Zachariæ, p. 20; 1 Demante, p. 298; 2 Furgole, *Don. quest.*, 31, n. 17: Pothier, *Intr. aux Cout.*, n. 51; 1 Argou, p. 109; C. N., 526. [I.447.]

382. All moveable property, of which the law ordains or authorizes the realization, becomes immoveable by determination of law, either absolutely or for certain purposes.

The law declares to be immoveable the capital of unredeemed constituted rents that were created before the promulgation of this code, as also all moneys produced by the redemption during their minority of constituted rents belonging to minors.

The same rule applies to all sums accruing to a minor from the sale of his immoveables during his minority, which sums remain immoveable so long as the minority, lasts.

The law declares to be immoveable all sums given by ascendants to their children, in contemplation of marriage, to be used in the purchase of real estate or to remain as private property to them only or to them and to their children.—Paris, 93-94; 1 Laurière, pp. 241-246; 1 Argou, 102 et seq.; 2 Du Parc Poullain, pp. 63 et seq.; Pothier, *Des choses*, p. 646; Intr. aux Cout., n. 55; Meslé, p. 510; 5 Pand. Franç., 75-6; 2 Marcadé, p. 364; 9 Demolombe, p. 248. [I. 447.]

DECISION:—Bank stock is an *immeuble fictif*.—PRIVY COUNCIL.—*Bank of Montreal & Simpson*, 6 L. C. J., p. 1.—PRIVY COUNCIL, 14 Moore's P. C., Rep., p. 142.

CHAPTER SECOND.

OF MOVEABLES.

383. Property is moveable by its nature or by determination of law.—Pothier, *Intr. aux Cout.*, 45, 46; *Ibid., Com.*, 28, 29; *Ibid.*,

Digitized by Google

Des choses, p. 638 ; 1 Argou, p. 98 ; 9 Demolombe, nn. 388 et seq ; 2 Marcadé, n. 373, p. 364 ; C. N., 527. [I. 447.]

384. All bodies which can be moved from one place to another, either by themselves, as animals, or by extrinsic force, as inanimate things, are moveable by nature.—*ff* L. 93, *De verb. signif.* ; Pothier, *Com.*, nn. 28, 29, 30, 34, 39 ; *Ibid.*, *Des choses*, p. 638 ; *Ibid.*, *Intr. aux Cout.*, n. 46 ; 3 Toullier, pp. 13, 14 ; 9 Demolombe, nn. 394-5 ; C. N., 528. [I. 449.].

385. Boats, scows, ships, floating mills and floating baths and generally all manufactories not built on piles and not forming part of the realty, are moveable.—Pothier, *Com.*, 29, 36 ; *Ibid.*, *Intr. aux Cout.*, 46 ; *Ibid.*, *Des choses*, p. 638 ; 1 Lamoignon, tit. 8, arts. 13, 14 ; Ord. de la marine, liv. 2, tit. 10, art. 1 ; C. N., 531. [I. 449.]

386. Materials arising from the demolition of a building, or of a wall or other fence. and those collected for the construction of a new one, are moveable so long as they are not used.

But things forming part of a building, wall or fence, and which are only temporarily separated from it, do not cease to be immoveable so long as they are destined to be placed back again.—Pothier, *Com.*, 39, 62, 195 ; *Ibid.*, *Intr.*, *aux Cout.*, 48 ; *Ibid.*, *Des choses*, p. 642 ; 5 Pand. Franç., p. 88 ; C. N., 532. [I. 449.]

387. Those immoveables are moveable by determination of law, of which the law for certain purposes authorizes the mobilization, so are all obligations and actions respecting moveable effects, including debts created or guaranteed by the province or by corporations, also all shares or interests in financial, commercial or manufacturing companies, although such companies, for the purposes of their business, should own immoveables. These immoveables are reputed to be moveable with regard to each partner, only so long as the company lasts.—1 Laurière, pp. 225 et seq. ; Lamoignon, tit. 8, art. 1, 2 ; Pothier, *Com.*, 60 ; *Ibid.*, *Intr. Cout.*, 50, 52, 56 ; *Ibid.*, *Des choses*, pp. 644 et seq. ; Paris, 89 ; C. N., 529. [I. 449.]

388. [Constituted rents and all other perpetual or life rents, are also moveable by determination of law ; saving those resulting from emphyteusis, which are immoveable.]—9 Demolombe, pp. 286-7 ; 2 Marcadé, p. 347 ; Pothier, *Intr. aux Cout.*, n. 55 ; C. N., 529. [I. 449.]

Digitized by Google

389. No ground-rent, or other rent, affecting real estate, can be created for a term exceeding ninety-nine years, or the lives of there persons consecutively.

These terms having expired, the creditor of any such rent may exact the capital of it.

Such rents although created for ninety-nine years, or for the lives of three persons, are, at all times, redeemable, at the option of the debtor, in the same manner as constituted rents to which they are assimilated.—C. S. L. C., c. 50, s. 1, pp. 484 et seq. [I. 449.]

DECISION:—Que depuis la mise en vigueur du Code Civil, le tiers détenteur d'un immeuble affecté au paiement d'une rente constituée, créée pour le paiement du prix de vente, n'est pas personnellement responsable du paiement de cette rente. Que ce principe établie par le Code Civil, s'étend à une rente constituée crée par un acte passé avant le code.—Q. B.—*Wright & Moreau*, M. L. R., 1 Q. B., p. 456.—C. R.—11 R. L., p. 544.

390. It is nevertheless competent for the parties to stipulate, in the title creating these rents, that they shall only be redeemed at a certain time agreed upon, which cannot exceed thirty years; every stipulation extending this term being null with regard to the excess. —*Ibid.*, s. 2; C. N. 350. [I. 449.]

391. All ground-rents, or other rents, affecting real estate, created heretofore, for a term exceeding ninety-nine years or the lives of three persons, are redeemable at the option of the debtor or of the possessor of the immoveable charged. *Ibid.*, s. 3; C. N. 530. [I. 451.]

392. Rents created by emphyteutic lease are not however subject to such redemption, nor those to which the creditor has only a conditional or a limited right.—*Ibid.*, s. 3. [I. 451.]

393. [Where the sum for which the redemption of rents, other than life-rents, may take place is neither fixed by law nor validly agreed upon, the rents are redeemed by the repayment of the original price in capital, or of the value in money put by the parties upon the things which formed the consideration of the rents so created. If such price or such value do not appear, the redemption is effected by the payment of a sum sufficient to produce a like rent for the future, at the legal rate of interest at the time of the redemption.]

Special provisions concerning the redemption of the rents substituted for seigniorial rights, are contained in chapter forty-one of the Consolidated Statutes for Lower Canada; C. N. 530. [I. 451.]

Digitized by Google

394. [Life-rents and other temporary rents, at the termination of which no reimbursement of the capital is to take place, are not redeemable at the option of either of the parties alone.

In the twelfth title of the third book, a mode is provided for the redemption of life-rents, when it takes place forcibly under judicial proceedings.

Temporary rents, other than life-rents, and not subject to reimbursement of the capital, are estimated, in like case, in the same manner as life-rents.] [I. 451 ; III 375.]

395. The word " moveables " employed alone in any law or act does not comprise money, precious stones, debts due, books, medals, scientific, artistic or mechanical instruments, body-linen, horses, carriages, arms, grain, wines, hay and other provisions, nor stock in trade.—1 Bourjon, liv. 1, ch. 4, s. 1, p. 140 ; Pothier, *Don. Test.*, c. 7 art. 4, s. 2 ; Fenet-Pothier sur art. 533 ; 5 Pand. Franç., p. 89 ; 7 Locre, *Esprit du Code*, p. 79 ; C. N., 533. [I. 451.]

DECISION :—Que les mots suivants contenus dans un testament, " donne et " lègue à son époux les argents et deniers quelconques, tant en argent monnoyé, " qu'en billets de banque et *autres valeurs quelconques*" comprennent les créances contre des particuliers appartenant au testateur.—C. R.—*Dumontet vs Dumontet*, 30 L. C. J., p. 240, 13 R. L., p. 459.

396. The word " furniture " comprises only the moveables which are destined to furnish and ornament apartments, such as tapestry, beds, seats, mirrors, clocks, tables, china and other objects of a like kind.

It also comprises pictures and statues, but not collections of pictures which are in galleries or particular rooms.

As regard china, likewise, only that which forms part of the decoration of a room comes under the denomination of furniture.—1 Bourjon, liv. 1, c. 4, s. 2, p. 140 ; Fenet-Pothier, 131 ; 5 Pand. Franç., 92-3 ; Pothier, *Don. Test.*, c. 7, art. 4, §§ 2, 9 ; Merlin, Rep., vo. *Biens*, § 1, n. 15 ; 3 Toullier, p. 18 ; C. N., 534. [I. 451.]

397. The expressions " moveable property," and " moveable things " comprise generally whatever is reputed moveable according to the rules above established.

In the sale or the gift of a "furnished house" the world "furnished" comprises no other moveables than furniture.—Pothier, *Don. Test* c. 7, art. 4, ss. 2, 3, 4 ; 1 Bourjon, liv. 1, c. 4, s. 3 ; 5 Pand. Franç., p. 95 ; 3 Toullier, 18 : C. N., 535. [I. 451.]

Digitized by Google

398. The sale or gift of a house with all that it contains, does not comprise ready money, nor debts due or other rights the titles to which happen to be in the house. It comprises all other moveable effects.—Pothier, *Don. Test.*, c. 7, art. 4, § 5 ; 5 Toullier, p. 504 ; 5 Pand. Franç., pp. 95, 96 ; C. N., 536. [I. 451.]

CHAPTER THIRD.

OF PROPERTY IN ITS RELATIONS WITH THOSE TO WHOM IT BELONGS OR WHO POSSESS IT.

399. Property belongs either to the crown, or to municipalities or other corporations, or to individuals.

That of the first kind is governed by public or administrative law.

That of the second is subject, in certain respects as to its administration, its acquisition and its alienation, to certain rules and formalities which are peculiar to it.

As to individuals, they have the free disposal of the things belonging to them, under the modifications established by law.—Cod. L. 21 *Mandati* ; Pothier, *Propriété*, n. 6, 7 ; 3 Toullier, pp. 23 et seq. ; 9 Demolombe, pp. 330 et seq. ; 3 Encyclop. de Droit, p. 135, n. 116 ; 2 Marcadé, p. 380, n. 393 ; 5 Pand. Franç., 96 et seq. ; 7 Locré, *Esprit du Code*, 86 ; Pothier, *Intr., Cout.*, n. 101 ; *Ibid., Des Personnes*, part. 1, tit. 7, art. 1, p. 637 ; C. N., 537. [I. 453.]

400. Roads and public ways maintained by the state, navigable and floatable rivers and streams and their banks, the sea-shore, lands reclaimed from the sea, ports, harbors and roadsteads and generally all those portions of territory which do not constitute private property, are considered as being dependencies of the crown domain.—Boutillier, *Somme rurale*, liv. 1, tit. 72, 73, 85 ; Loisel, *Instit., Cout.*, liv. 2, tit. 2, art. 5 ; Lebret, *De la souveraineté*, liv. 2, c. 15 ; Loyseau, *Seigneuries*, c. 12, n. 120 ; Chitty, *On Prerogatives*, 142, 206, 207 ; 2 Blackstone, 261, 262, note 6 ; 3 Toullier, nn. 30, 31, p. 24 ; 3 Encyclopédie de Droit, p. 136 ; C. N., 538. C. S. L. C., c. 24. [I. 453.]—Memo. An article on the right of use of navigable rivers is to be found at page 416 of vol. 3, R. C.

DECISIONS:—1. The banks of navigable rivers belong to the riparian proprietor subject to a servitude, in favor of the public, for all purposes of public utility.—COURT OF APPEAL.—*Fournier & Oliva*, Stuart's Rep., p. 427.

Digitized by Google

2. Navigable rivers have always been regarded as public highways and dependencies of the public domain; and floatable rivers are regarded in the same light. In both the public have a legal servitude for floating down logs or rafts, and the proprietors of the adjoining banks cannot use the beds of such rivers to the detriment of such servitude.—VICE ADMIRALTY COURT.—*Oliva vs Boissonnault*, Stuart's Rep., p. 524.

3. Rivers, whether navigable or not, are vested in the Crown for the public benefit, and no person, *seigneur* or other, can exercise any right over them without a grant from the Crown. In an action of damages, by the stopping of communication on a navigable river, with a boom and chain, it appearing from an agreement between the parties, after the commencement of the suit, that the placing of the boom and chain tended to their mutual benefit, the action was dismissed.—COURT OF APPEAL.—*Boissonnault & Oliva*, Stuart's Rep., p. 561.

4. The beach of the St Lawrence is the King's possession.—K. B.—*Morin vs Lefebvre*, 3 R. de L., p. 303.

5. Riparian proprietors are not entitled as a matter of right to obtain a grant of beach lots on the river St. Lawrence fronting their property in preference to any other person; in particular cases the Crown will grant such beach lots to persons not riparian proprietors.—BOWEN & MEREDITH, JJ.—*Reg. vs Baird*, 4 L. C. R., p. 325.

6. The owners of a raft which obstructed a navigable part of the river St. Lawrence within the jurisdiction of the Harbour Commissioners of Montreal (which said raft obstructed the inside channel of navigation in that part of the river, and also prevented access to the beach of said river by the proprietors thereof, by reason of the raft lying partly in the navigable part of the river and partly on the beach) were fined $20.00 and ordered to remove the obstruction.—HARBOUR COMMISSIONERS OF MONTREAL.—*Girouard vs Grier*, 3 R. C., p. 425.

7. The privilege of erecting a toll bridge over a river does not confer any right of property in the waters of that river, which are part of the public domain. The proprietor of such a bridge cannot demand the demolition of works erected upon a public river under authority of law, such as a bridge built by a Railway Company to cross passengers and carriages, even if used to convey them for gain or hire, contrary to a clause in his charter, his recourse being limited to the indemnity prescribed by his charter and in default of payment thereof a prohibition of all transport over the railway bridge will be granted.—SICOTTE, J.—*Jones vs Stanstead, Shefford & Chambly Ry. Co.*, 17 L. C. R., p. 81.

8. Appellant was liable for damages caused to a navigating vessel by the construction of booms in the river St Francis, notwithstanding that the statute which authorized the construction of these booms, in such a way as not to obstruct the navigation of the river, required that the plan and proposed site of the booms should be first submitted to and be approved by the Governor in Council, and that the plan and site of the booms had been actually approved of by the Governor in Council, when the evidence established that these booms really did form an obstruction to the navigation of the river.—Q. B.—*Pierreville Steam Mills Co. & Martineau*, 20 L. C. J., p. 225.

9. Les rivières navigables et flottables appartiennent au domaine public et comme telles ne peuvent servir à un usage privé, de manière à gêner l'usage public. Personne n'a le droit de faire des constructions sur les rivières navigables et flottables sans l'autorisation de l'autorité compétente; telles constructions ne

Digitized by Google

sont permises de droit que sur des cours d'eau qui ne sont pas navigables et flottables. Même lorsqu'elles sont faites sur autorisation légale, les constructions sur les rivières navigables et flottables ne doivent pas gêner la navigation ou le flottage sur ces rivières. Dans l'espèce les demandeurs ne peuvent obtenir des dommages causés à leurs constructions par le flottage des bois de la défenderesse, vu que ces constructions étaient faites sur une rivière navigable et flottable.—POLETTE, J.—*Béliveau vs Levasseur*, 1 R. L., p. 720.

10. The public have a right of servitude over all streams, whether navigable or not, or floatable or not, and, therefore, a party erecting a dam across a river in such a manner as to obstruct the free passage of floating logs, is liable to such damage as the owner of the logs may suffer by such obstructions.—Q. B.—*McBean & Carlisle*, 19 L. C. J., p. 276.

11. Le propriétaire riverain n'a pas le droit d'obstruer le passage sur une rivière flottable. Une rivière flottable seulement à certaines saisons de l'année, est assujettie aux lois générales concernant les rivières flottables.—C. R.—*Bourque vs Farwell*, 3 R. L., p. 700.

12. Que pour maintenir une action en dommages contre celui qui construit, avec la permission de la législature, un pont sur une rivière, en Canada, le propriétaire riverain doit prouver que cette construction gêne l'accès à sa propriété. Que partant, d'après la loi en Canada, il est nécessaire, pour réussir en son action que le demandeur prouve des dommages actuels et spéciaux.—PRIVY COUNCIL.—*Bell & City of Quebec*, 5 App. Cas., p. 84, 7 Q. L. R., p. 103.

13. Que tout chemin ouvert et fréquenté par le public comme tel, sans contestation, pendant l'espace de dix ans, et au-delà, doit être considéré un chemin public, et avoir été légalement reconnu chemin public suivant l'esprit de la loi.—Q. B.—*Mignerand dit Myrand & Légaré*, 6 Q. L. R., p. 120.

14. Where a person who already has a front road on his farm, voluntarily opens another road to the public through his land, such road will be considered a public front road, under article 397 of the Municipal Code.—JOHNSON, J.—*Corporation of the Village of Ste. Rose vs Dubois*, 4 L. N., p. 334.

15. A writing is not required to establish that property has been abandoned to the public for use as a public street, but the acts from which a dedication or abandonment can be inferred must be of a totally unequivocal character.—The fact that a street was openly used by the public, without dispute, for upwards of ten years, as a highway, and that the corporation of the city exercised visible ownership by constructing a side-walk thereon and filling in a swamp, more than ten years before the institution of the action, is sufficient proof of dedication by the proprietor.—Q. B.—*Guy & City of Montreal*, 3 L. N., p. 402.

16. Where an old market place had been converted by the City of Montreal into a public square, which the public had enjoyed, without interruption, from 1847 down to 1876, that there was, independently of any statutory provision, an ample case of user on the one side and dedication or abandonment on the other, which would constitute the square in question a public place, over which the public at large had rights to which the law would give effect.—That the square in question, having been enjoyed by the public as a public way during more than ten years before registration, under 23 Vict., c. 72, and more than ten years after such registration, it became a public highway under the terms of that statute.—PRIVY COUNCIL.—*Chevigny de la Chevrotière &*

Digitized by Google

City of Montreal, 12 App. Cass., p. 617, R. A. C., p. 900, 10 L. N., p. 42, 31 L. C. J. pp. 22 & 204.—Q. B.—6 L. N., p. 348.

17. Qu'une corporation municipale qui fait illégalement fermer et obstruer un chemin municipal et public, existant au delà de vingt ans, et qui sert de chemin de front d'une concession, sera responsable, vis-à-vis d'un propriétaire le long de ce chemin, des dommages qui résultent de cette fermeture.—Q. B.—*Corporation de la partie sud du Canton d'Irlande & Corporation du Canton de Colerain*, 13 R. L., p. 696.

18. A proprietor, owning land abutting on the river St. Lawrence at Montreal, has not such an easement or servitude as is susceptible of separate valuation, apart from compensation awarded on expropriation arbitration for the property itself. It is merely an element which should be considered by the arbitrators when estimating the indemnity to be awarded for the property expropriated.—Q. B.—*Starnes & Molson*, M. L. R., 1 Q. B., p. 425.

19. See also case noted at C. C. 407.—Q. B.—*North Shore Railway Co. & Pion*, 12 Q. L. R., p. 205, 4 Q. B. R., p. 358, 9 L. N., p. 218.

401. All estates which are vacant or without an owner, and those of persons who die without representatives or whose succession is abandoned, belong to the crown.—Paris, 167; Code, *de bonis vacantibus ; Ibid.* L. 2, *de petitionibus bon* ; 3 Toullier, p. 25 ; 5 Pand. Franç., p. 109 ; 7 Locré, p. 99 ; Dard. p. 117, note *(a)*; C. N., 539. [I. 453.]

402. The gates, walls, ditches and ramparts of military places and of fortresses also belong to the crown. — *Ibid.*; C. N., 450. [I. 453.]

403. The same rule applies to the lands, fortifications and ramparts of places which are no longer used for military purposes ; they belong to the crown, if they have not been validly alienated.—Edit de décembre, 1681 , 3 Toullier, pp. 25, 28, 348 ; 2 Marcadé, 382 ; 3 Encyclop. 136 ; 7 Locré, 96, 97 ; 5 Pand. Franç., 110, 111 ; C. N., 541. [I. 453.]

404. The property of municipalities and other corporations is that to which or to the use of which these bodies have an acquired right.—*ff* L. 6, *De divisione rerum* ; 3 Toullier, nn. 44, 45, 47-62 ; C. N., 542 ; 3 Encyclop. de Droit, 137 ; 5 Pand. Franç., p. 111. [I. 453.]

405. A person may have on property either a right of ownership, or a simple right of enjoyment, or a servitude to exercise.—3 Toullier, p. 245 ; 2 Marcadé, p. 384 ; 3 Encyclopédie de Droit, 138 ; C. N., 543. [I. 453.]

Digitized by Google

TITLE SECOND.

OF OWNERSHIP.

406. Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations.—Cod., L. 21, *Mandati;* Pothier, *Propriété,* nn. 4, 13, 14; *Ibid., Bail à rente,* nn. 42, 112; *Introd. Cout.,* nn. 100, 101; C. N., 544; 5 Pand. Franç., p. 180; 2 Marcadé, 395. [I 455.

DECISION :—1. Qu'en droit, la propriété des biens ne peut demeurer en suspens.—JETTÉ, J.—*Chester vs Galt,* 12 R. L., p. 54.

407. No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid.—Pothier, *Vente,* nn. 510-514; *Ibid., Propriété,* 274; 5 Pand. Franç., p. 183; C. N., 545. [I.455.]

DECISIONS :—1. An action of damages will not lie, for damages caused by the corporation of Montreal to a proprietor, by the expropriation of his property, where the damage caused by such expropriation has been assessed by the expropriation commissioners and paid to the proprietor, and when the corporation has acted within the powers conferred upon it by the legislature.—TORRANCE, J.—*Judah vs City of Montreal,* 14 L. C. J., p. 269.

2. Corporations, in using the power conferred to them, of expropriating, are bound to use due diligence, and, consequently, they are liable for the damages suffered by the expropriated proprietor by reason of unnecessary delays.—Q. B.—*Judah & City of Montreal,* 2 R. C., p. 470.

3. Les formalités imposées par le statut pour l'ouverture d'un chemin et pour l'expropriation des particuliers doivent être suivies avec rigueur et à peine de nullité.—Q. B.—*Doyon & Corporation de St. Joseph,* 17 L. C. J., p. 193.

4. Under the provisions of the Quebec Railway Act, the lessees for five years of a stone quarry, with right of quarry and right to renew lease for another five years, are occupiers of such land and parties interested therein, entitled to compensation for damages caused by expropriation of the property for railway purposes, within the meaning of the Act. During the pendency of an action, in the nature of an *action négatoire,* by such lessees against the railway company, in consequence of the company and the arbitrators appointed under the Act to determine the compensation to be paid in consequence of the expropriation of the leased property refusing to admit the right of said lessees to be indemnified under the Act, the plaintiffs are entitled to a writ of injunction against the railway company, in consequence of the company persisting in exercising their right of expropriation, without paying or offering to pay indemnity to the lessees.—Q. B.—*Bourgouin & Montreal Northern Colonization Ry. Co.,* 19 L. C. J., p. 57.

Digitized by Google

5. The plaintiff complained that the defendants, a municipal corporation, had caused his fence to be taken down, and expropriated a part of his land for the purpose of changing the direction of a certain road, without having caused the land to be valued by valuators.—*Held*, that the proceedings were irregular and must be set aside.—C. R.—*Deal vs Corporation of Phillipsburg*, 2 L. C. L. J., p. 40, 16 L. C. R., p. 342.

6. Petitions for expropriating under the Railway Act of 1869, must contain the description required by art. 2167 C. C.; the Commissioners of the Quebec, Montreal, Ottawa and Occidental Railway Company cannot in their own name exercise the right of action. The Railway being a public work, this right is vested in Her Majesty.—STUART, J.—*Ex parte, Commissioners of the Quebec, Montreal, Ottawa and Occidental Railway vs O'Neil*, 4 Q. L. R., p. 216.

7. In a case of a railway company expropriating land, the payment of the indemnity should precede the dispossession of the owner.—Q. B.—*Montreal, Ottawa & Occidental Railway Co. & Bourgoin*, 23 L. C. J., p. 96.

8. Que la compagnie de chemin de fer, autorisée par l'Etat à construire un chemin de fer sur la grève d'une rivière non encore concédée n'est redevable d'aucune indemnité aux propriétaires voisins ou autres individus auxquels elle enlève l'accès à la rivière dont ils jouissaient auparavant.—Q. B.—*Compagnie du Chemin de Fer du Nord & Pion*, 4 Q. B. R., p. 358, 9 L. N., p. 218; 12 Q. L. R., p. 205.

9. See also Q. B.—*Starnes & Molson*, M. L. R., 1 Q. B., p. 425, noted at C. C., 400.

10. Where a Railway Company takes possession of land for the purposes of their road with no other permission from the proprietor than that if they do so "it will be at their own risk," the proprietor may, even after the lapse of several years, recover back the land from the Company so long as no indemnity has been paid for it.—Q. B.—*Brewster & Mongeon*, 31 L. C. J., p. 115, M. L. R., 3 Q. B., p. 20, 15 R. L., p. 67.—LORANGER, J.—M. L. R., 2 S. C., p. 7.

11. Qu'un propriétaire a un recours direct, par action pétitoire, contre une compagnie de chemin de fer qui se serait mise en possession d'un terrain pour sa voie ferrée, sans le consentement du propriétaire et sans lui faire d'offre préalable pour le terrain ainsi occupé.—Q. B.—*Compagnie du Chemin de Fer Central & Legendre*, 11 Q. L. R., p. 106.

12. The proprietor of land required for a Railway Company has no alternative but to surrender it on receiving the indemnity awarded according to law. Neither can he, if he have freely allowed the Company to take possession of his land and place their line on it, revendicate it, but his sole remedy is his claim for indemnity.—C. R.—*Bank of Hochelaga vs Montreal, Portland & Boston Ry. Co.*, 12 R. L., p. 575.

13. Qu'une corporation municipale qui, pour élargir une rue et y construire un quai, s'empare d'une quantité de terrain, malgré son propriétaire, et prive celui-ci d'un passage communiquant à la grève, doit, ou remettre au propriétaire le terrain usurpé ou en payer la valeur, et, de plus, faire construire un passage en remplacement de celui enlevé et payer au propriétaire des dommages dont le montant sera établi par arbitres.—Q. B.—*Corporation de la Cité de Québec & Hall*, 15 R. L., p. 107.

14. Damage to rights of house owners, such as *droit d'accès* to streets, does not constitute "expropriation" and gives no right to preliminary indemnity. In

Digitized by Google

France the depreciation caused to a house by stopping one end of the street on which it fronts is not an interference with a servitude, nor, standing alone, such direct and immediate damage, as will give a title to indemnity, and, *semble*, the law of the Province of Quebec is the same.—PRIVY COUNCIL.—*Mayor of Montreal & Drummond*, 22 L. C. J., p. 1, App. Cas., p. 384, R. A. C., p. 1004.

15. Qu'une corporation municipale est responsable du dommage qu'elle cause à un propriétaire sur une rue dont elle change le niveau.—MATHIEU, J.—*Turgeon vs Cité de Montréal*, M. L. R., 1 S. C., p. 111.

16. That in the case submitted, the plaintiff was not entitled to damages by reason of the raising of the level of the sidewalk in front of her building in the City of Sherbrooke, no damage having been suffered by the Plaintiff in consequence of the change.—C. R.—*Boudreau vs Corporation of Sherbrooke*, M. L. R., 2 S. C., p. 188.

17. Qu'une corporation municipale qui, en vertu d'une autorisation de la législature, permet l'élévation d'une rue, ne sera responsable que des dommages résultant de la dépréciation en valeur des propriétés affectées par ce changement de niveau, et qu'elle n'est pas tenue d'élever les bâtisses dans la même proportion que la rue.—MATHIEU, J.—*Bronsdon vs City of Montreal*, 12 R. L., p. 610.

18. Que si une compagnie de chemin de fer s'empare d'un terrain, pour la construction de son chemin, sans avoir fait procéder à l'arbitrage ou avoir obtenu un bref de possession et sans l'accomplissement des formalités requises par R. S. C., cap. 109, s. 8, elle pourra être poursuivie au possessoire par le propriétaire de ce terrain.—Q. B.—*Cie du ch. de Fer de Temiscouata & Dubé*, 16 R. L., p. 285.

408. Ownership in a thing whether moveable or immoveable gives the right to all it produces, and to all that is joined to it as an accessory whether naturally or artificially. This right is called the right of accession.—*ff* L. 6, *De adquirendo rerum*; L. 5, *De rei vindicatione*; Pothier, *Propriété*, 5, 150, 151, 260: *Ibid., Introd. Cout.*, 100; C. N., 546. [I. 455.]

CHAPTER FIRST.

OF THE RIGHT OF ACCESSION OVER WHAT IS PRODUCED BY A THING.

409. The natural and industrial fruits of the earth, civil fruits, and the increase of animals, belong to the proprietor by right of accession.—*ff* L. 6, L. 9, *De adquirendo rerum dom.*; L. 5, *De rei vindicatione*: Pothier, *Propriété*, 151-154; 4 Pand. Franç., pp. 161, 184; 3 Toullier, p. 71; C. N., 547. [I. 455.]

410. The fruits produced by a thing, only belong to the proprietor subject to the obligation of restoring the cost of the ploughing, tilling and sowing done by third persons.—*ff* L. 9, *De adquirendo*

Digitized by Google

rerum dom.; L. 5, *De rei vindicatione*; Pothier, *Propriété*, 151; 5 Pand. Franç., p. 185; C. N., 548. [I. 455.]

411. A mere possessor only acquires the fruits in the case of his possession being in good faith; otherwise he is obliged to give the produce as well as the thing itself to the proprietor who claims it.

A possessor in good faith is not bound to set off the fruits against improvements for which he has a right to be reimbursed.—*ff* L. 25, *De usuris et fructibus*; Cod., L. 12, *De rei vindicatione*; Pothier, *Possession*, 82, 83; *Ibid., Prescription*, 78; *Ibid., Propriété*, 155, 281, 332-336, 341 et seq.; *Ibid., Intr. Cout.*, 107; *Vente*, 326; C. N., 549. [I. 455, III 375.]

412. A possessor is in good faith when he possesses in virtue of a title the defects of which as well as the happening of the resolutory cause which puts an end to it are unknown to him. Such good faith ceases only from the moment that these defects or the resolutory cause are made known to him by proceedings at law.—*ff* L. 109, *De verborum signific*; Serres, *Institutes*, p. 88; 2 Argou, 501; Pothier, *Possession*, n. 82, p. 550; *Propriété*, nn. 335, 341, 342; 1 Furgole, 328; 2 Marcadé, nn. 550 et seq.; 9 Demolombe, pp. 586 et seq.; 3 Toullier, p. 49; 2 Maleville, 28 et seq.; 1 Demante, n. 558; 1 Duranton, no. 584; Dard., p.120, note (*a*); 3 Encyclopédie, vo. *Bonne foi*, p. 236; C. N., 550. [I. 455.]

CHAPTER SECOND.

OF THE RIGHT OF ACCESSION OVER WHAT BECOMES UNITED AND INCORPORATED WITH A THING.

413. Whatever becomes united to or incorporated with a thing belongs to the proprietor, according to the rules hereinafter established.—Instit., lib. 2, tit. 1, § 29; *ff* L. 23, § *penul., De rei vindicat.*; Pothier, *Propriété*, 156; 3 Toullier, p. 73; 9 Demolombe, nn. 640 et seq,; C. N., 551. [I. 457.]

SECTION I.—OF THE RIGHT OF ACCESSION IN RELATION TO IMMOVEABLE PROPERTY.

414. Ownership of the soil carries with it ownership of what is above and what is below it.

Digitized by Google

The proprietor may make upon the soil any plantations or buildings he thinks proper, saving the exceptions established in the title *Of Real Servitudes.*

He may make below it any buildings or excavations he thinks proper, and draw from such excavations any products they may yield, saving the modifications resulting from the laws and regulations relating to mines, and the laws and regulations of police.—*ff* L. 24, *de servitutibus præd. urb.*; L. 21, § 2, *quod vi aut clam*; Cod., L. 8, L. 9, *de servitutibus et aquâ*; Paris, 187; Pothier, *Com.*, 32; Lamoignon, part. 2, tit. 20, art. 13; Merlin, Rép., vo. *Cave, Voisinage*, § 5; 4 Duranton, n. 370; 2 Maleville, 31-2; C. N., 552. [I. 457.]

DECISION:—La disposition de l'article 552 C. N., n'établit qu'une présomption de droit qui peut être détruite même par de simples présomptions contraires, spécialement, une cave, établie à la fois sous deux maisons voisines, n'est pas nécessairemsnt la propriété commune des propriétaires de ces deux maisons.—Cour d'Appel d'Orleans.—10 L. N., p. 283.

415. All buildings, plantations and works on any land or underground, are presumed to have been made by the proprietor at his own cost, and to belong to him, unless the contrary is proved; without prejudice to any right of property, either in a cellar under the building of another or in any other part of such building, which a third party may have acquired or may acquire by prescription.—*ff Arg. ex lege* 7, § 10, *De adquirendo rerum;* Pothier, *Propriété*, 177; 1 Delvincourt, p. 181, note 4; 4 Duranton, n. 372; 2 Marcadé, pp. 406-7: C. N., 553. [I. 457.]

416. The proprietor of the soil who has constructed buildings or works with materials which do not belong to him, must pay the value thereof; he may also be condemned to pay damages, if there be any, but the proprietor of the materials has no right to take them away.—*ff* L. 23, § 7, *De rei vindicatione*, *Ibid.*, L. 1, L. 2, *De ligno juncto;* Pothier, *Propriété*, 170, 171, 172, 178; 2 Maleville, p. 32; 5 Pand. Franç., pp. 202-3; 3 Touillier, p. 82; 2 Marcadé, n. 424; 9 Demolombe, 606; 1 Demante. nn. 558 et seq.; C. N., 554. [I. 457.]

DECISION:—L'appelante a vendu du bois à un nommé Parker, avec lequel ce dernier a successivement construit deux maisons sur la propriété de l'Intimé. L'Intimé a payé l'Appelant pour le bois fourni pour la première maison, mais il a refusé pour la seconde, prétextant qu'il n'avait jamais autorisé Parker à acheter du bois pour cette seconde construction, dont, selon lui, Parker devait retirer tout le bénéfice. L'Appelant a réclamé de l'Intimé le plein montant du bois livré à Parker par l'action *d'assumpsit*. *Jugé*:—1. Que Parker n'avait aucun mandat de l'intimé pour acheter les matériaux nécessaires à la construction

Digitized by Google

d'une seconde maison. 2. Que lors même que l'intimé dût profiter de cette seconde construction, ce qui n'est pas clairement établi, le recours de l'appelant contre lui ne pouvait être exercé que par une action spéciale et non pas par une action simple *d'assumpsit*.—Q. B.—*Ryder & Vaughan*, 1 Q. B. R., p. 19.

417. When improvements have been made by a possessor with his own materials, the right of the proprietor to such improvements depends on their nature and the good or bad faith of such possessor.

If they were necessary, the proprietor of the land cannot have them taken away; he must, in all cases, pay what they cost, even when they no longer exist; saving, in the case of bad faith, the compensation of rents, issues and profits.

If they were not necessary, and were made by a possessor in good faith, the proprietor is obliged to keep them, if they still exist, and to pay either the amount they cost or that to the extent of which the value of the land has been augmented.

If, on the contrary, the possessor were in bad faith, the proprietor has the option either of keeping them, upon paying what they cost or their actual value, or of permitting such possessor, if the latter can do so with advantage to himself and without deteriorating the land, to remove them at his own expense; otherwise, in each case, the improvements belong to the owner, without indemnification; the owner may, in every case, compel the possessor in bad faith to remove them.— 1 Merlin, Rép., vo. *Améliorations*, p. 367; Lacombe, vo. *Impenses*, pp. 342 et seq.; Pothier, *Propriété*, 170–1–2, 346–7; 5 Pand. Franç., 204; 2 Maleville, 34 et seq.; 3 Toullier, p. 83; Lahaye, p. 54; Fenet-Pothier, pp. 138, 139, Lawrence & Stuart, 6 L. C. R., p. 294; Ord. 1667, tit. 27, art. 9; 2 Marcadé, on art. 555; C. N., 555. [I. 457 to 459, III. 377.]

DECISIONS:—1. Sur réclamation pour impenses et améliorations sur des héritages dont l'usufruit seul a été saisi, il ne peut être accordé qu'une proportion de la valeur de telles impenses, suivant la plus-value qu'en a reçue l'usufruit.—Q. B.—*Fauteux & Boston*, 9 L. C. R, p. 263.

2. A possessor in bad faith of land, has no lien, *droit de rétention*, upon it for his improvements.—C. R.—*Lane vs Deloge*, I L. C. J., p. 3.

3. The defendant squatted upon land of an absentee (who was represented, however, by an agent), cleared and improved the land and paid the taxes for three years. *Held*, in an action, under C S. L. C., cap. 45, that the defendant was entitled to the value of his improvements, less the estimated value of the rents, issues and profits during his occupation.—*Semble*. A possessor in bad faith is entitled to be paid his *impenses utiles*.—Q. B.—*Ellice & Courtemanche*, 3 L. C. L. J., p. 126, 17 L. C. R., p. 433.

4. Le donataire d'un immeuble qui est poursuivi par son donateur, pour la résiliation de la donation, par défaut d'accomplissement des charges imposées,

Digitized by Google

doit dans cette instance réclamer le prix des améliorations qu'il prétend avoir droit de réclamer, et son défaut de ce faire soulève une présomption légale qu'il n'y a point d'améliorations dont il aurait pu réclamer le prix ou qu'il a abandonné son droit de les réclamer.—LORANGER, J.—*Pearce vs Gibbon*, 6 R. L., p. 649.

5. Action pour ouvrages faits sans le consentement du défendeur et en son absence, et qui ne résultent pas à son profit, déboutée, mais droit au demandeur d'enlever ses matérieux en remettant les lieux dans le même état.—Q. B.—*Piton & Lepage*, 7 R. L., p. 603.

6. Que le propriétaire d'une bâtisse ou autre amélioration sur le terrain d'autrui peut, par l'enregistrement, acquérir une hypothèque sur ces améliorations. —C. R.—*Prud'homme vs Scott*, M. L. R., 2. S. C., p. 63, 30 L. C. J., p. 156.

7. But see Q. B.—*Boyd & Wilson*, 3 Q. B. R., p. 273, noted at C. C. 379.

8. That a squatter entering upon lands, with a knowledge that he has no right to do so and without making proper enquiries as to the real owner of such lands, will be held to have been in bad faith and has no claim against the proprietor nor any lien upon such lands for the improvements he has made thereon during his occupancy, with his own materials.—C. R.—*Galarneau vs Christin*, 10 Q. L. R., p. 83.

9. That the right of the third party to remove the improvements made by him upon the property of another, gives him no privilege upon the proceeds of the sale of that property. In the case in issue, a tutor had built on his pupil's property and subsequent to the majority of the pupil, the property was sold by sheriff's sale. The tutor then sought by *opposition afin de conserver sur deniers* to reclaim the enhanced value of the property.—Q. B.—*D'Orsennens & Christin*, 4 Q. B R., p. 253, 30 L. C. J., p. 9.

10. The possessor in bad faith is entitled to set off the cost of necessary improvements against the claim for rents, issues and profits received by him during his possession. As to improvements not necessary, the proprietor has the option of keeping them, upon paying their value, or of permitting the possessor to remove them, which, however, he may only do when they can be removed without injury to the land.—C. R.—*Wright vs Wright*, 6 L. N., p. 116.

11. Que le tiers détenteur condamné à rendre l'immeuble qu'il détient après liquidation des fruits et revenus et des impenses et améliorations, sous la réserve de son droit de rétention s'il y a excédent en sa faveur, a droit de percevoir les fruits de l'immeuble revendiqué jusqu'au jugement final, sauf à rendre compte au propriétaire.—ROUTHIER, J.—*Dufour vs Dufour*, 10 L. N., p. 305.

12. Le possesseur de bonne foi en vertu d'un titre a droit de retenir l'immeuble sur lequel il a fait des améliorations utiles jusqu'à ce que le propriétaire lui ait payé la plus value donnée à l'immeuble par ses améliorations.—Q. B.—*Nugent & Mitchell*, 13 Q. L. R., p. 149.

13. Que les constructions et améliorations faites par l'occupant ou usufruitier d'un terrain appartenant à autrui sont immeubles et peuvent être hypothéqués au profit du dit occupant ou usufruitier.—C. R.—*Donais vs Molleur*, 31 L. C. J., p. 141.

418. In the case of the third paragraph of the preceding article, if the improvements made by the possessor be so extensive and costly that the owner of the land cannot pay for them, he may, according to the circumstances and to the discretion of the court, compel the

Digitized by Google

possessor to keep the property, and to pay the estimated value of it. [I. 457.]

419. In case the party in possession is forced to give up the immoveable upon which he has made improvements for which he is entitled to be reimbursed, he has a right to retain the property until such reimbursement is made, without prejudice to his personal recourse to obtain repayment; saving the case of surrender in any hypothecary action, which is specially provided for in the title *Of Privileges and Hypothecs.* [I. 457, III 377.]

DECISIONS:—1. A squatter who has made substantial improvements (*impenses utiles*) upon real property occupied by him, without the consent of the proprietor, is entitled to judgment against the proprietor for the excess of the value of such improvements beyond the rents, issues and profits, and to retain possession of the real property until he is paid for his improvements. SHORT, J.—*Stuart vs Eaton*, 8 L. C. R., p. 113.

2. The defendant in a petitory action, who had remained in possession of land for several years to the knowledge of plaintiff's agent, who resided near the lot (the plaintiff living in England) and who had paid the municipal taxes, cleared and fenced part of the land and had built a brick house and barn, is entitled to his *impenses utiles* after deducting the rents and revenues of the land and to be paid such *impenses* before being dispossessed, notwithstanding that he knew the land to belong to the plaintiff at the time that he entered it.—Q. B.—*Ellice & Courtemanche*, 17 L. C. R., p. 433 ; 3 L. C. L. J., p. 126.

3. The defendant who has made permanent and endurable improvements upon a lot of land sought to be recovered by petitory action, has a right to be indemnified to the extent of the increased value given by such improvements to the lot, before being compelled to abandon the same.—Q. B.—*Lawrence & Stuart*, 6 L. C. R., p. 294.

4. Le droit de retention pour impenses de la part d'un légataire particulier poursuivi en réduction et remise du legs par un créancier de la succession, n'existe pas en vertu de l'article 419 C. C., mais il n'y a lieu qu'à un privilège sur le prix de l'immeuble vendu suivant l'article 2072 C. C.—Q. B.—*Matte & Laroche*, 4 Q. L. R., p. 65.

5. Que des donataires, poursuivis en nullité de la donation par des créanciers du donateur, qui prétendent que cette donation a été faite en fraude de leurs droits, ne peuvent réclamer le droit de rétention des immeubles donnés, pour être payés des améliorations qu'ils ont faites à l'immeuble, et que tout ce qu'ils peuvent réclamer, c'est que le délaissement ne soit ordonné qu'à la charge de leur privilège d'être payés de ces dépenses.—MATHIEU, J.,—*Prouse vs Simpson*, 13 R. L., p. 302.

See also cases noted at 2073 C. C.

420. Deposits of earth and augmentations which are gradually and imperceptibly formed on land contiguous to a stream or river are called alluvion.

Digitized by Google

Whether the stream or river is or is not navigable or floatable, the alluvion which is produced becomes the property of the owner of the adjacent land, subject in the former case, to the obligation of leaving a foot-road or tow-path. — 2 Maleville, 35–6; Ord. des Eaux et Forêts, 1669, tit. 28, art. 7; 2 Edits et Ord., p. 24; 7 Locré, *Esprit du Code*, pp. 165 et seq.; C. N., 556; Institutes, liv. 2, tit. 1, § 20; Maynard, liv. 10, c. 3; Dupérier, liv. 2, quest. 3; Dumoulin, sur Paris, § 1, glose 5, nn. 115; Bacquet, Dr. de justice, c. 30, n. 8; 2 Bousquet, pp. 56–7; Lacombe, vo. *Alluvion*, p. 34. [I. 459.]

DECISIONS:—1. Accession to a lot of ground situate upon the borders of the River St. Lawrence, by alluvial deposits, belongs to the riparian proprietor.—COURT OF APPEAL.—*Newton & Roy*, 3 R. de L., p. 93.

2. Qu'un propriétaire riverain dont la terre se prolonge jusqu'à une rivière navigable et flottable, n'a aucune réclamation contre une personne qui enlève du gravier et fait des excavations sur sa grève en face de son terrain entre l'eau basse et la ligne des inondations.—LORANGER, J.—*Desjardins vs Hotte*, 11 L. N., p. 275.

421. As to ground left dry by running water which insensibly withdraws from one of its banks by bearing in upon the other, the proprietor of the unconvered bank gains such ground, and the proprietor of the opposite bank cannot reclaim the land he has lost.

This right does not exist as regards land reclaimed from the sea, which forms part of the public domain. —*ff* L. 7, § 1, *De aquirendo rerum*; Ord. 1681, liv. 4. tit. 7; Lebret, liv. 2, c. 14; Pothier, *Propriété*, n. 159; 5 Pand. Franç., p. 211; 2 Maleville, p. 37; 3 Toullier, p. 105; 2 Blackstone, 262; Com. Dig. Prerog., D. 61; Chitty, *Prerog.*, 207-8; 2 Bousquet, p. 58; 2 Marcadé, p. 417. [I. 459.]

422. Alluvion does not take place on the borders of lakes and ponds which are private property; neither the proprietor of the lake nor the proprietor of the adjacent land gains or loses in consequence of the waters happening to rise or fall above or below their ordinary level. —*ff* L. 7, § 6; L. 12, *De aquirendo rerum*; 2 Bousquet, p. 59; 5 Pand. Franç., p. 213; 4 Proudhon, *Dom. Publ.*, 577 et seq.; Lacombe, vo. *Alluvion*, n. 3, p. 34; C. N., 558. [I. 459.]

423. If a river or stream, whether navigable or not, carry away by sudden force a considerable and distinguishable part of an adjacent field and bear it towards a lower or opposite bank, the proprietor of the part carried away may reclaim it; [but he is obliged, on pain of forfeiting his right, to do so within a year, to be reckoned from the possession taken of it by the proprietor of the land to which it has been united.]—*ff* L. 7, § 2, *De adquirendo rerum*; Anc. Deniz.,

Digitized by Google

vo. *Alluvion*, n. 4, p. 94 ; Lacombe, vo. *Alluvion*, n. 2, p. 34 ; Pothier, *Propriété*, nn. 158, 165 ; 1 Nouv. Denizart, vo. *Alluvion*, n. 2, pp. 465-6-7 ; C. N., 559. [I. 459.]

424. Islands, islets, and deposits of earth formed in the beds of navigable or floatable rivers and streams belong to the crown, if there be no title to the contrary.—Pothier, *Propriété*, n. 160-163 ; Loisel, *Inst. Cout.*, liv. 2, tit. 2, art, 12 ; Bacquet, *Droits de Justice*, c. 30, n. 2, 5, 6 ; Boutaric, *Instit.*, liv. 2, tit. 1, § 22 ; C. N. 560. [I. 459.]

425. Islands and deposits of earth which are formed in rivers which are not navigable or floatable belong to the proprietors of the banks on the side where the island is formed. If the island be not formed on one side only, it belongs to the proprietors of the banks on both sides, divided by a line supposed to be drawn in the middle of the river. —*ff* L. 29, *De aquirendo rerum* ; Inst., § 22, *De aquirendo rerum* ; Pothier, *Propriété*, n. 164 ; Lacombe, vo. *Isle, Islot*, n. 1, p. 373 ; C. N., 561. [I. 461.]

426. If a river or stream, by forming a new branch, cut and surround the field of a proprietor contiguous to it, and thereby form an island, the proprietor retains the property of his field, although the island be formed in a navigable or floatable river or stream.—*ff* L, 7, § 4, *De aquirendo rerum* ; Instit., § 22, *De divisione rerum ;* Pothier, *Propriété*, n. 162 ; Anc. Deniz., vo. *Alluvion*, n. 4 ; 2 Marcadé, p. 421 ; 5 Pand. Franç., pp. 137-8 ; C. N., 562. [I. 461.]

427. If a navigable or floatable river or stream abandon its course to take a new one, the former bed belongs to the crown. If the river be not navigable or floatable, the proprietors of the land newly occupied take as an indemnity the ancient bed, each in proportion to the land which has been taken from him.—Pothier, *Propriété*, n. 161-4 ; 2 Henrys, liv. 3, *quest.* 30 ; Serres, *Iustit.*, liv. 2, tit. 1, § 23 ; 2 Bousquet, p. 65 ; C. N., 563. [I. 461.]

★**428.** Pigeons, rabbits, and fish which go into another dovecot, warren or pond, become the property of him to whom such pond, warren or dove-cot belongs, provided they have not been attracted there by fraud or artifice.—*ff* L. 3, § 2, *De aquirendo rerum* ; Pothier, *Propriété*, 166-7-8, 278-9 ; Instit., lib., 2, tit. 1, §§ 14, 15, 16 ; Lapeyrère, *Lettre Q*, n. 29 ; 2 Bousquet, p. 66 ; 2 Maleville, p. 43 ;

Digitized by Google

Merlin, Rép., vo. *Colombier;* 10 Demolombe, p. 150; 5 Pand. Franç., 216–7; 7 Locré, *Esp. du Code*, pp. 189, 190; C. N., 564. [I. 461.]

DECISION:—Que les pigeons qui passent dans le colombier d'un voisin, sans fraude ni artifice, deviennent sa propriété par droit d'accession, et que nous ne reconnaissons qu'une seule sorte de pigeons.—LORANGER, J.—*Lecomte vs Cotret*, 8 L. N., p. 234.

SECTION II.—OF THE RIGHT OF ACCESSION IN RELATION TO MOVEABLE PROPERTY.

429. The right of accession, when it has for its object two moveable things, belonging to two different owners, is entirely subordinate to the principles of natural equity.

The following rules which are obligatory in the cases where they apply, serve as examples in the cases not provided for, according to circumstances.—Instit., *lib.* 2, tit. 1, § 27; 2 Bousquet, p. 67, sur art. 565; 5 Pand. Franç., pp. 128 et seq., 217; 2 Marcadé, pp. 425-6; 3 Toullier, p. 73; 2 Maleville, pp. 43-4; C. N., 565. [I. 461.]

430. When two things belonging to different owners have been united so as to form a whole, although they are separable and one can subsist without the other, the whole belongs to the owner of the thing which forms the principal part, subject to the obligation of paying the value of the other thing, to him to whom it belonged.—*ff* L. 26, § 1, *De adquirendo rerum;* Pothier, *Propriété*, nn. 169, 170, 179, 180; 1 Sebire et Carteret, vo. *Accession*, p. 104; 4 Duranton, n. 435; 7 Locré, p. 193; 3 Toullier, p. 74; C. N., 566. [I. 461.]

431. That part is reputed to be the principal one to which the other has been united only for the use, ornament or completion of the former.—*ff* L. 26, §, *De adquirendo rerum;* Pothier, *Propriété*, nn. 173, 174; 2 Marcadé, pp. 426-7; 3 Toullier, p. 74; 5 Pand. Franç., p. 218; Sebire et Carteret, vo. *Accession*, pp. 103 et seq.; 4 Duranton, nn. 436 et seq.; C. N., 567. [I. 463.]

432. However, when the thing united is much more valuable than the principal thing, and has been employed without the knowledge of its owner, he may require that the thing so united be separated in order to be returned to him, although the thing to which it has been joined may thereby suffer some injury.—*ff* L. 9, § 2, *De adquirendo rerum*; *Instit.*, lib. 2, § 1, 25, *De divisione rerum*; Pothier, *Propriété*, nn. 177, 179; Sebire et Carteret, vo. *Accession*, pp.

Digitized by Google

104-5; 4 Duranton, n. 439; 5 Pand. Franç., pp. 218-9; C. N., 568. [I. 463.]

433. If of two things united so as to form a whole, one cannot be considered as the accessory of the other, the more valuable, or if the values be nearly equal, the more considerable in bulk, is deemed to be the principal.—Pothier, *Propriété*, n. 174; *ff* L. 27, § 2, *De adquirendo rerum*; 3 Toullier, p. 75; 5 Pand. Franç., p. 219; 4 Duranton, n. 440; 1 Sebire et Carteret, p. 104; 1 Demante, n. 573; C. N., 569. [I. 463.]

434. If an artisan or any other person have made use of any material which did not belong to him to form a thing of a new description, whether the material can resume its previous form or not, he who was the owner of it has a right to demand the thing so formed, on paying the price of the workmanship.—*ff* L. 7, § 7, L. 26, § 1, 3, *De adquirendo rerum*; Pothier, *Propriété*, nn. 186-8, 191; 3 Toullier, p. 76; 5 Pand. Franç., pp. 219, 220; C. N., 570. [I. 463.]

DECISION:—Que des ouvriers et journaliers qui travaillent dans une carrière, n'ont pas de privilège sur les outils servant à l'exploitation de la carrière, ni sur la pierre qui en est extraite et taillée, surtout quand ces outils et cette carrière n'appartiennent pas à celui qui a employé les ouvriers.—C. R.—*Prévost vs Wilson*, 22 L. C. J., p. 70.

435. If however the workmanship be so important that it greatly exceeds the value of the material employed, it is then considered as the principal part, and the workman has a right to retain the thing, on paying the price of the material to the proprietor.—*ff* L. 9, § 1, 2, *De adquirendo rerum*; Pothier, *Propriété* n. 173; 1 Sebire et Carteret, pp. 104-5; 5 Pand. Franç., pp. 220-1; C. N., 571. [I. 463.]

DECISIONS:—1. Que celui qui, de bonne foi, a coupé du bois sur les terres de la Couronne, croyant qu'elles lui avaient été octroyées pendant qu'elles étaient comprises dans les limites d'une coupe de bois concédée à un autre, n'est tenu de payer au propriétaire de cette coupe de bois que la valeur du bois sur pied et non la valeur des billots qu'il a fait.—Q. B.—*Reynar & Thompson*, 3 Q. B. R., p. 175, 12 R. L., p. 150, 5 L. N., p. 421.

2. When a party cuts timber on the limits of another, the owner of the limits is entitled to claim the timber on paying him the price of the labor to convert it into logs and convey it to the market (C. C. 439). That the party who cut the timber could only transfer the price of the labor to which he was entitled and not the value of the timber.—Q. B.—*Millar & Merchants Bank*, 3 Q. B. R., p. 79.

Memo: Dorion, C. J. *loq.*—It does not seem to matter, as regards the

Digitized by Google

application of C. C. 434, 435 and 440, whether there is good faith or not, and that was the opinion of the majority of the Court.—See 3 Q. B. R., p. 87 & 88.

3. Que la coupe, l'enlèvement et le transport des billots ne produisent pas une chose d'une nouvelle espèce, et que, lors même que leur valeur excède celle du bois sur pied, ils ne sont pas une accession de la chose et du travail qui permette à celui qui a fourni la main d'œuvre de garder le bois en payant le prix.—C. R.—*Allard vs Tourville*, 8 Q. L. R., p. 237.

4. That the owner of standing trees which have been cut down and converted into cord-wood by a person in good faith, cannot revendicate the cord-wood, if the value of the work bestowed on it in making it, greatly exceed the value of the trees. and he can only claim the value of the trees when standing, if, moreover, he has suffered no damage beyond that value.—McCord, J.—*Hall vs Hould*, 7 Q. L. R., p. 31.

5. Where defendant took a quantity of plaintiff's lumber and converted it into shingles and the plaintiff revendicated it, the defendant was condemned to pay the value of the lumber. Article 435 C. C. does not declare that the property of material belonging to another is transferred to the workman, when the added workmanship is so important that it greatly exceeds the value of the material employed. The workman has only the faculty of retaining the thing on paying the owner the price of the material and thus becoming the owner.—Q. B. —*Beard & Miliken*, 6 L. N., p. 381, 11 R. L., p. 436.—C. R.—5 L. N., p. 185, 11 R. L., p. 436.

436. When a person has made use of materials which in part belonged to him and in part did not, to make a thing of a different kind, without either of the two materials being entirely destroyed, but in such a way that they cannot be separated without inconvenience, the thing is common to the two proprietors, in proportion, as respects the one, to the material belonging to him, and as respects the other, to the material belonging to him and to the price of the workmanship.—*ff* L. 7, §, 8, 9, L. 12, § 1, *De aquirendo rerum*; Pothier, *Propriété*, n. 187; 3 Touillier, p. 77; 5 Pand. Franç., p. 157, nn. 31 et seq., et p. 221; C. N., 572. [I. 463.]

437. When a thing has been formed by the admixture of several materials belonging to different proprietors, but of which neither can be looked upon as the principal matter, if the materials can be separated, the owner, without whose knowledge the materials have been mixed, may demand their division.

If the materials cannot be separated without inconvenience, the parties acquire the ownership of the thing in common, in proportion to the quantity, quality and value of the materials belonging to each. —*ff* L. 12, § 1, *De adquirendo rerum*; L. 5, *De rei vindicatione*; Pothier, *Propriété*, nn. 175, 190, 191; 3 Toullier, p. 78; 5 Pand. Franc., pp. 157, 222; C. N., 573. [I. 463.]

Digitized by Google

438. If the material belonging to one of the proprietors be much superior in quantity and price, in that case the proprietor of the material of superior value may claim the thing produced by the admixture, on paying to the other the value of his material.—*ff Arg. ex lege*, 27, *De aquirendo rerum ;* Pothier, *Propriété*, n. 192 ; 3 Toullier, p. 78 ; C. N., 574. [I. 465.]

439. When the thing remains in common among the proprietors of the materials from which it is made, it must be disposed of by licitation for the common benefit, if any one of them demand it.—*ff* L. 5, *De rei vindicatione ; Instit.*, lib. 1, tit. 2, § 28, *De rerum divisione;* Pothier, *Propriété*, n. 192; 2 Bousquet, p. 75 ; 5 Pand. Franç., pp. 156 et seq. ; 2 Marcadé p. 432 ; C. N., 575. [I. 465.]

440. In all cases where a proprietor whose material has been employed without his consent, to make a thing of a different description, may claim the proprietorship of such thing, he has the choice of demanding the restitution of his material in the same kind, quantity, weight, measure and quality, or its value.—Pothier, *Propriété*,, nn. 191-2 ; 5 Pand. Franç., p. 223 ; 2 Bousquet, p. 76 ; 2 Marcadé, p. 432, n. 453 ; C. N., 576. [I.465.]

441. Whoever is bound to give back a moveable object upon which he has made improvements or additions for which he is entitled to be reimbursed, may retain such object until he has been so reimbursed, without prejudice to his personal remedy. [III. 377.]

DECISION :—Que celui qui a fait à un objet mobilier des améliorations dont il a droit d'être remboursé, peut retenir cet objet jusqu'à ce qu'il ait été remboursé et qu'il a sur cet objet un droit de gage et qu'il peut opposer la saisie de cet objet retenu en gage.—Casault, J.—*Belleau vs Piton*, 13 Q. L. R., p. 337.

442. Persons who have employed materials belonging to others and without their consent, may be condemned to pay damages if any there be.—C. N., 577. [I. 465.]

Digitized by Google

TITLE THIRD.

OF USUFRUCT, USE AND HABITATION.

CHAPTER FIRST.

OF USUFRUCT.

443. Usufruct is the right of enjoying things of which another has the ownership, as the proprietor himself, but subject to the obligation of preserving the substance thereof.—*ff* L. 1, 2, 4, *De usufructu et quem;* L. 28, *De verborum signific; Instit.* lib. 2, tit. 4, *in pr.;* Pothier, *Douaire,* nn. 194, 209, 215-218, 220; *Ibid., Vente,* n. 548; 2 Bousquet, p. 77; 2 Marcadé, pp. 444 et seq.; 2 Maleville, p. 50; 7 Locré, pp. 218 et seq.; C. N., 578. [I. 465.]

DECISION:—When a person intervened in the marriage contract of his niece and made her a donation of $200,000, payable at his death, the intended husband to have the "administration and enjoyment of the said sum of $200,000, from the time of the same becoming due" the condition being fulfilled, viz, birth of children.—*Held:* That the husband was the usufructuary and the wife had the *nue propriété,* and in such case the action against the donor's universal legatee for the recovery of the amount of the donation can be brought by the usufructuary alone. An action of the wife even with her husband's authorization, will be dismissed.—C. R.—*Kimber vs Judah,* M. L. R., 2 S. C, p. 86.

For several cases deciding whether a substitution or a usufruct was erected by the terms of the instrument relied on; see cases noted at C. C., 928.

444. Usufruct may be established by law, or by the will of man.—*ff* L. 6, § 1, *De usufructu,* etc.; Pothier, *Vente,* n. 548; Guyot, Rép., vo. *Usufruit,* p. 393; Paris, 230, 314, 249, 255, 262; 2 Bousquet, p. 78; 5 Pand. Franç., pp. 231 et seq.; 2 Marcadé, p. 447; 2 Maleville, pp. 50-1; C. N., 579. [I. 465.]

445. Usufruct may be established purely or conditionally, and may commence at once or from a certain day.—*ff* L. 4, *De usufructu,* etc.; Lacombe, vo. *Usufruit,* n. 8, p. 817; 5 Pand. Franç., p. 241; 2 Marcadé, 449; C. N., 580. [I. 465.]

Digitized by Google

446. It may be established upon property of all kinds, moveable or immoveable.—*ff* L. 3, § 1, 7, *De usufructu*, etc.; Lacombe, vo. *Usufruit*, p. 817, n. 4; 2 Marcadé, pp. 449 et seq.; C. N., 581. [I. 465.]

SECTION I.—OF THE RIGHTS OF THE USUFRUCTUARY.

447. The usufructuary has the right to enjoy every kind of fruits, whether natural, industrial or civil, which the thing subject to the usufruct can produce.—*ff* L. 1, 7, 9, 15, 59, 68, *De usufructu*, etc.; Pothier, *Douaire*, nn. 194, 190, 200.—Pothier, *Propriété*, n. 153; 3 Toullier, p. 261; 5 Pand. Franç., p. 242; C. N., 582. [I. 467.]

Amendment:—See amendments effected by different Railway Acts, noted at C. C., 297.

DECISIONS:—1. Qu'un legs d'une somme d'argent fait à une personne en propriété et à une autre en usufruit, donne à l'usufruitière le droit de toucher la somme léguée et de la faire fructifier à sa guise pendant la durée de son usufruit.—CIMON, J.—*St. Aubin vs Lacombe*, M. L. R., 2 S. C., p. 110.

2. The usufructuary and not the *nue propriétaire* is the person who has the sole right to sue for the recovery of the subject of the usufruct.—C. R.—*Kimber vs Judah*, M. L. R., 2 S. C., p. 86.

3. Que l'usufruitière ne peut prendre une action en partage et licitation du fonds sur lequel porte son usufruit.—ROUTHIER, J.—*McNicholl vs Laberge*, 10 L. N., p. 130.

4. Que l'usufruitier a droit d'action pour recouvrer les capitaux des créances dont il a l'usufruit.—CIMON, J.—*Bérubé vs Morneau*, 14 Q. L. R., p. 90.

448. Natural fruits are those which are the spontaneous produce of the soil. The produce and the increase of animals are also natural fruits.

The industrial fruits of the soil are those obtained by the cultivation or working thereof.—*ff* L. 77, *De verborum signif*; L. 36, § 5, *De hæreditatis petitione*; Pothier, *Douaire*, nn. 198-9; *Com.*, n. 115; 3 Toullier, p. 262; 5 Pand. Franç., pp. 161, 245; C. N., 583. [I. 467.]

449. Civil fruits are the rent of houses, interest of sums due and arrears of rents. The rent due for the lease of farms is also included in the class of civil fruits.—*ff* L. 121, *De verborum signif*; L. 36, *De usuris et fruct*; L. 62, *De rei vindicatione*; Pothier, *Douaire*, nn. 203-4; *Com.*, nn. 205, 221; 5 Pand. Franç., pp. 161, 245 et seq.; 2 Hennequin, 366; 3 Toullier, p. 263; C. N., 584. [I. 467.]

450. Natural and industrial fruits attached by branches or roots, at the moment when the usufruct is open, belong to the usufructuary.

Digitized by Google

Those in the same condition at the moment when the usufruct ceases, belong to the proprietor, without recompense on either side for ploughing or sowing, but also without prejudice to the portion of the fruits which may be acquired by a farmer on shares, if there be one at the commencement or at the termination of the usufruct.—*ff* L. 27, L. 58, L. 59, *De usufructu*, etc.; L. 13, *Quibus modis usufructus et usus*; L. 32, L. 42, *De usu et usufructu*; Paris, 231; Pothier, *Douaire*, nn. 160, 194, 199, 202, 273, 275; *Ibid., Com.*, nn. 206-7-9, 212-3; *Ibid., Intr. Cout. d'Orl.*, tit. 10; *Ibid., Mandat*, n. 192; 3 Toullier, p. 264; 5 Pand. Franç., pp. 248 et seq.; N. Deniz., vo. *Fruits*, § 3, n. 3; 3 Du Parc Poullain, pp. 290-1; C. N., 585. [I. 467.]

451. Civil fruits are considered to be acquired day by day, and belong to the usufructuary in proportion to the duration of his usufruct.

This rule applies to rent from the lease of farms, as it does to the rent of houses and to other civil fruits.—*ff* L. 7, *De soluto matrimonio*; *ff* L. 26, *De usufructu et quem*; Pothier, *Douaire*, nn. 160, 205; *Ibid., Com.*, nn. 220-1; C. N., 586. [I. 467.]

452. If the usufruct comprise things which cannot be used without being consumed, such as money, grain, liquors, the usufructuary has the right to use them, but subject to the obligation of paying back others of like quantity, quality and value, or their equivalent in money, at the end of the usufruct.—*ff* L. 7, *De usufructu earum rerum*; Lacombe, vo. *Usufruit*, n. 4, p. 817; Pothier, *Don entre mari et femme*, n. 215; 2 Maleville, pp. 55, 63; 2 Hennequin, pp. 251 et seq.; 5 Pand Franç., p. 251; 3 Touillier, p. 259; Merlin, Rép., vo. *Usufruit*, § 4, n. 8; C. N., 587. [I. 467.]

453. The usufruct of a life-rent gives also to the usufructuary, during the period of his usufruct, the right to retain the whole of the payments that he has received as payable in advance, without being obliged to make any restitution.—Pothier, *Douaire*, n. 25; *Ibid., Don entre mari et femme*, n. 219; *Ibid., Com.*, n. 232; 2 Maleville, p. 55; 5 Pand. Franç., p. 245; Lacombe, vo. *Usufruit*, n. 4, p. 817; 2 Hennequin, pp. 248-9; C. N., 588. [I. 467 to 469.]

454. If the usufruct comprise things which, without being at once consumed, deteriorate gradually by use, as linen or furniture, the usufructuary has the right to use them for the purpose for which

Digitized by Google

they are destined, and, at the end of the usufruct, he is only obliged to restore them in the condition in which they may be, and not deteriorated by his fraud or fault.—*ff* L. 15, §§ 1, 2, 3, 4, *De usufructu, etc,*; L. 9, § 3 *Usufructuarius quemadmod;* Pothier, *Douaire,* nn 194, 209, 215-6-7-8, 220; *Ibid., Vente,* n. 549; 2 Maleville, p. 56; Merlin, vo. *Usufruit,* § 2, n. 3, § 4; 5 Pand. Franç., p. 252; 3 Toullier, pp. 248, 324; Proudhon, *Usufruit,* t. 1, n. 67; t. 2, nn. 887, 1056, 1081, 1111; tome 3, n. 1726; tome 4, n. 2234, et tome 5, nn. 2579, 2651; 2 Bousquet, 84-5; Domat, liv. 1, *Usufruit,* tit. 11, § 3; C. N., 589. [I. 469.]

DECISION:—Que l'usufruit et jouissance des meubles meublant, et des choses qui, sans se consumer de suite, se détériorent peu à peu par l'usage, détenus à titre d'usufruit, ne peuvent être saisis et vendus par les créanciers de l'usufruitier.—STUART, J.—*Bertrand vs Pepin,* 6 Q. L. R., p. 352.

455. The usufructuary cannot fell trees which grow on the land subject to the usufruct. Whatever he may require for his own use must be taken from those which have fallen accidentally.

If however among the latter there be not a sufficient quantity of a suitable kind for the repairs to which he is obliged, and for the keeping in repair and the working of the estate, he has a right to fell whatever may be required for these purposes, conformably to the usage of the place, or to the custom of proprietors; he may even fell trees for fuel, if there be any of the kind generally used in the locality for that purpose.—*ff* L. 12, *De usufructu et quem;* Lacombe, vo *Usufruit,* n. 7, pp. 819, 823; Pothier, *Douaire,* n. 197; 5 Pand. Franç., p. 259; 3 Proudhon, *Usufruit,* p. 55, n. 1194; N. Deniz., vo. *Baliveaux,* § 4; 3 Toullier. p. 271, note (1); C. N., 590-593 [I. 469.]

456. Any fruit trees which die, even those which are uprooted or broken by accident, belong to the usufructuary, but he is obliged to replace them by others, unless the larger proportion has been thus destroyed, in which case he is not obliged to replace them.—*ff* L. 12, *De usufructu et quem*; Pothier, *Douaire,* nn. 210, 211; 3 Toullier, p. 271; 3 Proudhon, nn. 1175 & 1199; 5 Pand. Franç., 262; C. N., 594. [I. 469.]

457. The usufructuary may enjoy his right by himself, or lease it, and may even sell it or dispose of it gratuitously.

If he lease it, the lease expires with his usufruct; nevertheless the farmer or the tenant has a right and may be compelled to continue his enjoyment during the rest of the year which had begun before

Digitized by Google

the usufruct expired; subject to the payment of the rent to the proprietor.—*ff* L. 12, L. 67, *De usufructu et quem*; L. 9, *Locati conducti*; Pothier, *Douaire*, nn. 195, 220, 270; *Vente*, n. 549; *Ibid., Louage*, n. 43; Lacombe, vo. *Usufruit*, n. 15, p. 825; Loyseau, *Déguerpissement*, liv. 6, c. 1, n. 6; 3 Toullier, n. 413, p. 273; 3 Proudhon, *Usufruit*, nn. 1212, 1215; 10 Demolombe, n. 349, p. 309; C. N., 595. [I. 469.]

458. The usufructuary enjoys any augmentation caused by alluvion to the land of which he has the usufruct.

But his right does not extend to islands formed during the usufruct near the land which is subject to it and to which such islands belong. —*ff* L. 9, § 4, *De usufructu, etc.*; Pothier, *Douaire*, n. 68; 2 Maleville, p. 60; 5 Pand. Franç., pp. 263-4; 2 Bousquet, p. 89; C. N., 596. [I. 469.]

459. He enjoys all rights of servitude, of passage, and generally all the rights of the proprietor in the same manner as the proprietor himself.—*ff* L. 12, *Communia prædiorum*; L. 20, § 1, *Si servitus vindicetur*; L. 25, *De servit. prædior. rusticor*; Pothier, *Douaire*, nn. 195, 209, 210; 2 Maleville, p. 60; 2 Bousquet, p. 89; 5 Pand. Franç., pp. 264-5; 3 Toullier, pp. 262, 273; Merlin, vo. *Usufruit*, § 4, n. 11; C. N., 597. [I. 471.]

460. Mines and quarries are not comprised in the usufruct of land.

The usufructuary may nevertheless take therefrom all the materials necessary for the repair and maintenance of the estate subject to his right.

If however these quarries, before the opening of the usufruct, have been worked as a source of revenue by the proprietor, the usufructuary may continue such working in the way in which it has been begun.—Pothier, *Douaire*, n. 195; *Com.*, nn. 97, 204; *Ibid.*, intr. au tit. 10, *Cout. d'Orl.*, n. 100; 10 Demolombe, n. 433; 10 *Ibid.*, n. 430, p. 376; Projet du code Nap., liv. 2, tit. 3, art. 23, p. 146; Merlin, Rép., vo. *Usufruit*, § 4, n. 3; 2 Maleville, sur art. 598, *in fine*, p. 62; C. N., 598. [I. 471.]

DECISION: - The person charged with a substitution has not the right to sell sand from the land charged with the substitution, and where sale was made of all the sand that Appellants could carry away during five years, it was held that the substitute could recover the value of such sand by direct action against the purchasers, Appellants.—Q. B.—*Bulmer & Dufresne*, 3 Q. B. R., p. 90.—Dorion, J.,—21 L. C. J., p. 98.

Digitized by Google

461. The usufructuary has no right over treasure found, during the usufruct, on the land which is subject to it.—*ff* L. 7, § 12, *Soluto matrimonio*; Serres, *Institutes*, p. 91; 1 Despeisses, n. 9, p. 558; Pothier, *Douaire*, n. 196; 5 Pand. Franç., pp. 266-7; C. N., 598. [I. 471.]

462. The proprietor cannot, by any act of his whatever, injure the rights of the usufructuary.

On his side, the usufructuary cannot, at the cessation of the usufruct, claim indemnity for any improvements he has made, even when the value of the thing is augmented thereby.

He may however take away the mirrors, pictures and other ornaments which he has placed there, but subject to the obligation of restoring the property to its former condition.—*ff* L. 15, § 6, 7; L. 16 *De usufructu*, etc.; *ff* L. 12, *De usu et usufructu*; Pothier, *Douaire*; nn. 241-2-3, 271-7-8-9; *Ibid.*, *Propriété*, n. 12; Fenet-Pothier, sur art. 524, p. 126; 2 Maleville, p. 63; 2 Bousquet, pp. 91-2; 3 Toullier, pp. 12, 284, 285, 292 et seq., 306; 5 Pand. Franç., pp, 267 et seq., nn. 37, 38; Proudhon, nn. 1108, 1124, 1426, 1463; C. N., 599. [I. 471.]

SECTION II.—OF THE OBLIGATIONS OF THE USUFRUCTUARY.

463. The usufructuary takes the things in the condition in which they are; but he can only enter into the enjoyment of them after having caused an inventory of the moveable property and a statement of the immoveables subject to his right to be drawn up, in the presence of or after due notice given to the proprietor, unless he is dispensed from doing so by the act constituting the usufruct.—*ff* L. 65, § 1, *De usufructu;* L. 12, *De usu et usufructu*; L. 1, *in pr. et* § 4, *usufructuarius quemad. caveat;* Cod., L. 4, § 1, *De usufructu et habitatione*; Serres, *Institutes*, pp. 148, 310; Pothier, *Douaire* nn. 221-8; *Don entre mari et femme*, nn. 44, 212, 215, 240; 17 Guyot vo. *Usufruit*, p. 393; Merlin, vo. *Usufruit*, § 2, n. 2; 2 Maleville, pp. 65-6, 279; 1 Argou, 202; 5 Pand. Franç., pp. 271-3; 10 Demolombe, nn. 473-4; 3 Toullier, nn. 419, 420. C. N., 600. [I. 471.]

DECISION:—An usufructuary, who does not allege, either that she is in possession of her usufruct or that she has made an inventory as required by C. C. 463, cannot, by an action, recover a debt due to the estate of which she has been left the usufruct (C. C. 450 & 891.)—C. R.—*Abercromby vs Chabot*, 7 Q. L. R., p. 371.

464. He gives security to enjoy the usufruct as a prudent administrator, unless the act creating it exempts him from so doing;

Digitized by Google

nevertheless the vendor or donor who has reserved the usufruct is not obliged to give security.—*ff* L. 2, L. 7, L. 9, § 1, *Usufructurius quemad;* Cod., L. 1, *De usufructu et habitatione;* Pothier, *Douaire*, nn. 211, 221; Paris, 285; Lacombe, vo. *Usufruit*, pp. 818 et seq., nn. 1 et seq.; Guyot. Rép., vo. *Usufruit*, pp. 393-4; 1 Argou, p. 204; 3 Toullier, pp. 279, 280; Fenet-Pothier, sur art. 601, p. 154; 5 Pand. Franç., pp. 275 et seq., nn. 41 et seq.; 10 Demolombe, nn. 480 et seq.; C. N., 601. [I. 471 to 473.]

465. If the usufructuary cannot give security, the immoveables are leased, farmed or sequestrated.

Sums of money comprised in the usufruct are invested; provisions, and other moveable things which are consumable by use, are sold, and the price produced is likewise invested.

The interest of such sums of money, and the rent from leases belong in these cases to the usufructuary.—*ff* L. 5 § 1, *Ut legatorum seu fideicommis;* Carondas, sur art. 285 de Paris; Pothier, *Douaire* n. 227; 2 Marcadé, pp. 483 et seq.; Lacombe ,vo. *Usufruit*, n. 1, p. 819; Guypape, *Quest.*, 250; 5 Pand. Franç., pp. 281-2; Ricard, *Don mutuel* n. 285; 10 Demolombe, n. 493 et seq.; 2 Proudhon, *Usufruit*, nn. 84 et seq.; C. N., 602. [I. 473.]

466. In default of security the proprietor may require tha moveable property liable to be deteriorated by use, be sold in orde that the price may be invested and received as in the precedin article.

Nevertheless the usufructuary may demand and the court ma grant, according to circumstances, that a portion of the moveable necessary for his use may be left to him on the simple security of hi oath, and subject to the obligation of producing them at the expiratio of the usufruct.—*ff* L. 5, § 1, *Ut legatorum seu fideicom.;* Instit., *D satisdationibus*, § 2; 1 Salviat, 142; Pothier, *Douaire*, n. 227; Serre *Institutes*, pp. 105-6; Authorities under preceding article; C. N 603. [I. 473.]

467. The delay to give security does not deprive the usufruc tuary of whatever fruits he is entitled to; they are due to hi from the moment the usufruct is open.—*ff* L. 10, § 1, *De usufruct eurum;* Institut., § 3, *De fidejussoribus;* Lacombe, vo. *Usufruit*, n. p. 818; 5 Pand. Franç., p. 283; 2 Maleville, p. 69; Demolomb n. 516, p. 445; C. N., 604. [I. 473.]

Digitized by Google

468. The usufructuary is only liable for the lesser repairs. For the greater repairs the proprietor remains liable, unless they result from the neglect of the lesser repairs since the commencement of the usufruct, in which case the usufructuary is also held liable.—*ff* L. 7, § 2, L. 13, *De usufructu et quem;* Cod. L. 7, *De usufructu;* Pothier, *Douaire*, nn. 238, 239, 280; *Ibid., Don entre mari et femme*, 236-7-8; *Ibid., Bail à rente*, n. 43; *Ibid., Communauté*, n. 272; Lacombe, vo. *Usufruit*, sect. 2, n. 11; 5 Pand. Franç., pp. 284-5; 2 Maleville, p. 69; C. N., 605. [I. 473.]

DECISION :—1. L'usufruitier ne peut répéter du propriétaire que les grosses réparations et les réparations nécessaires pour la conservation et l'exploitation des immeubles sujets à l'usufruit. L'usufruitier ne peut réclamer les impenses utiles que jusqu'à concurrence de ce que les immeubles s'en trouvent être de plus grande valeur au moment de l'ouverture de la substitution. Les impenses grosses et nécessaires sont remboursables en entier, quand bien même elles n'existeraient plus au moment de l'ouverture de la substitution, pourvu que l'usufruitier ne soit pas coupable de leur disparition par suite de son manque d'entretien. Les impenses voluptuaires ne sont pas remboursables.—TASCHEREAU, J.—*Lafontaine vs Suzor*, 11 L. C. R., p. 388.

2. The proprietor of land enjoyed by another in usufruct, has not, by law, any right of action against such usufructuary to compel him to make specific reparations and do works on such land, or in default thereof to recover damages against such usufructuary during the subsistance of such usufruct, the action against a usufructuary proprietor in such a case is to have him declared *déchu de ses droits* or that he be sequestrated.—C. R.—*McGinnis vs Choquet*, 5 L. C. J., p. 99, M. C. R., p. 108.

469. The greater repairs are those of main walls and vaults, the restoration of beams and the entire roofs and also the entire reparation of dams, prop-walls and fences.

All other repairs are lesser repairs.—*ff* L. 7, *De usufructu et quem;* Paris, 262; Pothier, *Douaire*, n. 238; *Ibid., Com.*, n. 272; 2 Bourjon, p. 34; Lacombe, vo. *Usufruitier*, sect. 2, n. 2; 2 Maleville, p. 70; 5 Pand. Franç., pp. 287-8; 10 Demolombe, nn. 551 et seq., 582; C. N., 606. [I. 473.]

DECISION :—1. In the present case, the work done was not a re-construction but a *grosse réparation*.—TASCHEREAU, J.—*Thivierge vs Thivierge*, M. L. R., 2 S. C., p. 198.

470. Neither the proprietor nor the usufructuary is obliged to rebuild what has fallen into decay or what has been destroyed by unforeseen event.—*ff* L. 7, § 2, L. 46, § 1, L. 65, § 1, *De usufructu, etc.;* Domat, *De l'usufruit*, sect. 5, n. 5; 5 Du Parc Poullain, p. 324, n. 411; 2 Desgodets, sur art. 202, C. P., pp. 29 et seq.; Pothier, *Douaire*, nn.

Digitized by Google

238, 239, 246; *Ibid., Don entre mari et femme,* n. 238; Lacombe, vo. *Usufruit,* n. 12, p. 821; 3 Toullier, nn. 443 et seq., pp. 296 et seq.; 2 Maleville, p. 71; 2 Marcadé, pp. 488 et seq.; 5 Pand. Franç., pp. 289 et seq.; 10 Demolombe, n. 707; Serres, *Institutes,* p. 108; C. N., 607. [I. 473 to 475.]

471. The usufructuary is liable, during his enjoyment, for all ordinary charges, such as ground-rents and other annual dues and contributions encumbering the property when the usufruct begins.

He is likewise liable for all charges of an extraordinary nature imposed thereupon since that time, such as assessments for the erection and repair of churches, public and municipal contributions and other like burthens.—*ff* L. 27, § 3, 4; L. 7, § 2, L. 52, *De usufructu, etc.; ff* L. 28, *De usu et usufructu;* Paris, 287; Lacombe, vo. *Usufruit,* n. 14; Carondas, *Pand.,* liv. 2. ch. 13; Pothier, *Don entre mari et femme,* nn. 236, 242; *Ibid., Douaire,* n. 230; Guyot, Rép., vo. *Usufruit,* p. 396; Fenet-Pothier, sur art. 608, pp, 157 et seq.; 2 Maleville, p. 71; 5 Pand. Franç., pp. 291 et seq.; 3 Toullier, n. 431; 2 Marcadé, pp. 493 et seq.; 2 Hennequin, p. 445; 2 Demante, n. 451 *bis;* 10 Demolombe, pp. 550 et seq.; nn. 601 et seq.; C. N., 608, 609. [I. 475.]

DECISIONS:—1. An usufructuary is responsible for the taxes.—BEAUDRY, J.—*Corporation of Montreal vs Contant,* 2 R. C., p. 482.

2. Where a *cessionnaire* of usufructuary rights in an immoveable neglected to pay the taxes and subsequently bought in the property at a sale for taxes, the title so acquired could not prevail against the owner of the *nue propriété.*—Q. B.—*Bourassa & Lacerte,* 11 Q. L. R., p. 242.

3. Que les taxes municipales et autres impositions publiques sont à la charge de l'usufruitier.—JETTÉ, J.—*Cité de Montréal vs Bronnsdon,* M. L. R., 3 S. C., p. 146.

472. A legacy made by a testator of a life-rent or alimentary pension, must be entirely paid by the universal legatee of the usufruct, or by the legatee by general title of the usufruct according to the extent of his enjoyment, without any recourse in either case.—Cod., L. ult., § 4, *De bonis quæ liberis*; Anc. Deniz., vo. *Usufruit,* n. 36; Guyot, Rép., vo. *Usufruit,* p. 396; 2 Maleville, p. 72; 5 Pand. Franç., p. 294; 7 Locré, *Esprit du Code,* pp. 299-302; 4 Duranton, nn. 636-7; 2 Boileux, p. 763; C. N., 610. [I. 475.]

473. A usufructuary by particular title is not liable for the payment of any part of the hereditary debts, not even of those for which the land subject to the usufruct is hypothecated.

Digitized by Google

If he be forced, in order to retain his enjoyment, to pay any of these debts, he has his recourse against the debtor and against the proprietor of the land.—*ff* L. *ult.*, *De usu et usufructu*; Lacombe, vo. *Legs*, p. 403; vo. *Usufruit*, n. 15; Guyot, Rép., vo. *Usufruit*, p. 396; 2 Marcadé, nn. 531 et seq., pp. 501 et seq.; 2 Boileux, pp. 759 et seq.; 7 Locré, p. 304; 5 Pand. Franç., p. 295; 10 Demolombe, n. 604; 2 Toullier, n. 452; 4 Proudhon, *Usufruit*, nn. 1829, 1843; Dalloz, Dict., vo. *Usufruit*, n. 572; C. N., 611. [I. 475.]

474. A general usufructuary or a usufructuary by general title must contribute with the proprietor to the payment of the debts as follows:

The immoveables and other things subject to the usufruct are valued, and the contribution to the debts is fixed in proportion to such value.

If the usufructuary advance the sum for which the proprietor must contribute, the capital of it is restored to him at the expiration of the usufruct, without interest.

If the usufructuary will not make this advance, the proprietor has the choice either of paying the sum, and in such case the usufructuary is obliged to pay him the interest thereon during the continuance of the usufruct, or of causing a sufficient portion of the property subject to the usufruct to be sold.—Cod., L. 15, *De donationibus*; Dargentré, sur art, 219, *Cout. de Bretagne*; Guypape, *Quest*, 541; Lapeyrère, lettre V, n. 75; Lacombe, vo. *Dettes*, p. 172, n. 13, p. 821; Paris, art. 334, 335; 5 Nouv. Deniz., vo. *Contrib. aux dettes*, p. 499; 17 Guyot, Répert,, p. 396; 2 Boileux, pp. 761-2; 2 Marcadé, p. 500, n. 529; C. N., 612. [I. 475.]

DECISIONS:—1. Que le légataire ou donataire universel en usufruit est tenu personnellement, vis-à-vis des créanciers, des dettes de la succession, même des capitaux, et que la contribution aux dites dettes par les nu-propriétaires dans les proportions fixées par la loi, doit être établie entre eux et l'usufruitier, ne regarde pas les créanciers et n'empêche pas leur recours.—TASCHEREAU, J.—*Boileau vs Seers*, M. L. R., 1 S. C., p. 239.

2. An usufructuary by general title is bound to contribute with the proprietor, out of a sum of ready money received from the estate, to pay a debt of the estate which became due after the testator's death.—C. R.—*Les Religieuses de l'Hôtel-Dieu vs Nelson*, 7 L. N. p. 84.

3. Qu'une partie défenderesse condamnée comme usufruitière universelle de son mari décédé, est dans la même condition qu'un légataire universel, et est personnellement obligée au paiement de la condamnation.—Q. B.—*Hudon & Painchaud*, 24 L. C. J., p. 268.

Digitized by Google

475. The usufructuary is only liable for the costs of such su as relate to the enjoyment, and for any other condemnations to whi these suits may give rise.—*ff* L. 60, *De usufructu;* L. 5, *Si usu fructus;* Lacombe, vo. *Usufruit*, p. 821; 10 Domolombe, nn. 619 seq.; 3 Toullier, p. 289; 2 Boileux, p. 767; 2 Marcadé, p. 574; 2 Pan Franç., p. 299; C. N., 613. [I. 477.]

476. If during the continuance of the usufruct, a third par commit any encroachments on the land, or otherwise attack the righ of the proprietor, the usufructuary is obliged to notify him of it, a in default thereof he is responsible for all the damage which ma result therefrom to the proprietor, in the same manner as he wou be if the injury were done by himself.—*ff* L. 15, § 7, *De usufructu* L. 1, § 7, L. 2, *Usufructuarius quemad;* Pothier, *Douaire*, nn. 281- Fenet-Pothier, p. 159; 2 Boileux, p. 768, n. 614; 2 Marcadé, p. 50 sur art. 614; C. N., 614. [I. 477.]

477. If an animal only be the subject of the usufruct, and perish without the fault of the usufructuary, he is not bound to giv back another, nor to pay its value.—*ff* L. 70, § 3, *De usufructu;* Ar Denizart, vo. *Usufruit*, § 2, n. 6; 2 Maleville, 75; 3 Toullier, p. 29 C. N., 615. [I. 477.]

478. If the usufruct be created on a herd or flock, and it peris entirely by accident or disease, and without the fault of the usufru tuary, he is only obliged to account to the proprietor for the skins their value.

If the flock do not perish entirely, the usufructuary is obliged replace the animals which have perished, up to the number of th increase.—*ff* L. 68, § 2, L. 69, L. 70, §§ 1, 2, 3, 4, 5, *De usufructu* Instit., *De divisione rerum*, § 38; 5 Pand. Franç., pp. 302 et seq.; Toullier, p. 291; 2 Maleville, p. 76; 2 Boilenx, pp. 765-6; C. N., 61 [I. 477.]

SECTION III.—OF THE TERMINATION OF USUFRUCT.

479. Usufruct ends by the natural or civil death of th usufructuary, if for life;

By the expiration of the time for which it was granted;

By the confusion or reunion in one person of the two qualiti of usufructuary and of proprietor;

Digitized by Google

By non-user of the right during thirty years, and by prescription acquired by third persons ;

By the total loss of the thing on which the usufruct is established.—*ff* L. 3, § *ult.*, L. 17, L. 27, *Quibus modis, etc.* ; *ff* L. 8, *De annuis legatis* ; *ff* L. 22, L. 29, *De usu et usufructu* ; *ff* L. 10, *De capite minutis* ; Cod., L. 12, L. 14, L. 16, *De usufructu* ; Instit., *De usufructu*, § 3 ; Cod., L. 13, *De servitutibus et aquâ* ; L. 3, *De prescriptione*, § 30, *vel.* 40 ; Pothier, *Douaire*, nn. 247, 249, 255, 74, 253, 268 ; Pothier, *Don entre mari et femme*, nn. 252 et seq. ; Pothier, *Vente*, n. 549 ; Dard, p. 136 ; Merlin, vo. *Usufruit*, § 5, art. 1, art. 3, n. 3 ; Guyot, vo. *Usufruit*, pp. 402 et seq. ; Lacombe, vo. *Usufruit*, sec. 4, pp. 827 et seq. ; Serres, *Institutes*, pp. 106-7-8 ; 5 Pand. Franç., p. 307, nn. 62-68 ; 2 Boileux, pp. 771 et seq. ; C. N., 617. [I. 477.]

DECISIONS :—1. The building of a house upon real estate subject to a usufruct does not cause such a change in the property built upon as to put an end to the usufruct.—Q. B.—*Little & Deganard*, 12 L. C. R., p. 178.

2. Qu'une réserve de coupe de bois établie dans un acte de donation en faveur d'un enfant du donateur *à prendre à son besoin tant qu'il y en aura*, est de la nature d'un usufruit, prend fin à la mort de la personne avantagée et ne passe pas à ses héritiers.—ANGERS, J.—*Pelletier vs Caron*, 13 Q. L. R., p. 117.

480. Usufruct may also cease by reason of the abuse the usufructuary makes of his enjoyment, either by committing waste on the property or by allowing it to depreciate for want of care.

The creditors of the usufructuary may intervene in contestations, for the preservation of their rights ; they may offer to repair the injury done and give security for the future.

The courts may, according to the gravity of the circumstances, either pronounce the absolute extinction of the usufruct, or only permit the entry of the proprietor into possession of the object charged with it, subject to the obligation of annually paying to the usufructuary or to his representatives a fixed sum, until the time when the usufruct shall cease.—*ff* L. 38, *De rei vindicatione* ; *Instit., De usufructu*, § 3 ; Papon, *Arrêts*, liv. 14, tit. 2, art. 6 ; Mornac, sur L. 4, *Cod., De usufructu* ; Favre, *Cod.*, liv. 3, tit. 3, *Définition*, 1 ; Maynard, liv. 8, ch. 7 ; Guyot, vo. *Usufruit*, § 4, pp. 405 et seq. ; Lacombe, vo. *Usufruit*, n. 18, p. 830 ; Pothier, *Douaire*, n. 249 ; 5 Pand. Franç., pp. 324 et seq. ; C. N., 618. [I. 477 to 479.]

481. A usufruct which is granted without term to a corporation only lasts thirty years.—*ff* L. 68. *Ad legem falcidiam* ; Domat, tit. 11, *De l'usufruit*, p. 310, Edit. in-8 ; Dunod, *Prescriptions*, pp. 211-2 ;

Digitized by Google

Serres, *Institutes*, p. 107 ; Lacombe, vo. *Usufruit*, p. 828, n. 7 ; Guyot, vo. *Usufruit*, p. 403 ; 5 Pand. Franç., pp. 327-8 ; 2 Maleville, p. 79 ; C. N., 619. [I. 479.]

482. A usufruct granted until a third party reaches a certain fixed age, continues until such time, although the third person should die before that age.—Cod. L. 12, *De usufructu ;* Guyot, vo. *Usufruit*, p. 407, § 5 ; Merlin, vo. *Mort civile*, § 1, art. 3, n. 11 ; 3 Toullier, n. 450 ; C. N., 620. [I.479.]

483. The sale of a thing subject to usufruct does not in any respect change the right of the usufructuary ; he continues to enjoy his usufruct, unless he has formally renounced it.—*ff* L. 17, § 2, *De usufructu et quemad* ; *ff* L. 19, *Quibus modis usufructus*; 5 Pand. Franç., pp. 315, 332 ; 3 Toullier, pp. 251, 293, 321-22 ; Maleville, p. 80 ; C. N., 621. [I.479.]

484. The creditors of the usufructuary may have his renunciation annulled, if it be made to their prejudice.—*ff* L. 10, L. 15, *Quæ in fraudem creditorum ;* 2 Maleville, p. 80 ; 5 Pand. Franç., p. 332 ; 2 Marcadé, 560, p. 528 ; C. N., 622. [I. 479.]

485. If only a part of the thing subject to the usufruct perish, the usufruct continues to exist upon the remainder.—*ff* L. 34, § 2, L. 53, *De usufructu et quemad* ; Serres, p. 108 ; Guyot, vo. *Usufruit*, p. 404 ; Lacombe, vo, *Usufruit*, sec. 6, n. 14, p. 829; 3 Toullier, p. 320 ; 5 Pand, Franc., p. 333 ; 2 Maleville, p. 81 ; C. N., 623. [I. 479.]

486. If the usufruct be established upon a building only, and such building be destroyed by fire or other accident, or fall from age, the usufructuary has no right to enjoy either the ground or the materials.

If the usufruct be established on a property of which the building destroyed formed part, the usufructuary enjoys the ground and the materials.—*ff* L. 5, § 2, L. 9, L. 10, *Quibus modis usufructus ; ff* L. 34, § ult., L. 36, *De usufructu et quemad ;* Institutes, *De usufructu*, § 3, *in fine ;* Serres, p. 108 ; Lacombe, vo. *Usufruit*, p. 829 ; 5 Pand. Franç., pp. 318, 333 ; 2 Boileux, p. 783 ; Fenet-Pothier, sur art. 624, p. 162 ; 10 Demolombe, nn. 704-711 ; C. N., 624. [I. 479.]

Digitized by Google

CHAPTER SECOND.

OF USE AND HABITATION.

487. A right of use is a right to enjoy a thing belonging to another and to take the fruits thereof, but only to the extent of the requirements of the user and of his family.

When applied to a house, right of use is called right of habitation.—*ff De usu et habitatione, toto titulo ;* Lacombe, vo. *Usage,* p. 814 ; *Habitation,* p. 326 ; Pothier, *Habitation,* nn. 1, 2, 3 et seq. ; Guyot vo. *Usage,* p. 378 ; Merlin, Rép., vo. *Habitation,* p. 191 ; 5 Proudhon, nn. 2739 et seq. ; 2 Boileux, pp. 784-5 ; 2 Marcadé, p. 534 ; 5 Pand. Franç., p. 237 ; 2 Hannequin. [I. 481.]

488. Rights of use and habitation are established only by the will of man, by deed *inter vivos* or by last will.

They cease in the same manner as usufruct.—Pothier, *Habitation,* nn. 22 et seq. ; Nouv. Deniz., vo. *Habitation,* § 4, p. 569 ; Merlin, vo. *Habitation ;* 2 Marcadé, n. 568, p. 535 ; 2 Boileux, p. 785, note (2) ; C. N., 625. [I. 481.]

489. These rights cannot be exercised without previously giving security, and making statements and inventories as in the case of usufruct.—*ff.* L. 13, *De usufructu et quem ;* L. 1, *Usufructuarius quemad ;* Cod., *De usufructu et habitatione ;* Pothier, *Habitation,* n. 20 ; Merlin, vo. *Habitation,* s. 1, § 2, n. 6, p. 199 ; C. N., 626. [I. 481.]

490. He who has a right of use or of habitation, must exercise it as a prudent administrator.—Cod., *Arg. ex lege* 4, *De usufructu et habit* ; 7 Locré, p. 337 ; C. N., 627. [I. 481.]

491. Rights of use and of habitation are governed by the title which creates them, and are more or less extensive according to its dispositions.—Pothier, *Habitation,* nn. 17, 31 ; Nouv. Deniz., vo. *Habitation,* p. 563 ; Proudhon, *Usufruit,* n. 2768 ; C. N., 628. [I. 481.]

DECISION :—Un droit d'usage en bois entre particuliers est un droit personnel et non réel. Ce droit de coupe de bois est purgé par le décret.—MONK, J.—*Lefebvre vs Gosselin,* 9 L. C. J., p. 95.

Digitized by Google

492. If the title be not explicit as to the extent of these rights, they are governed as follows.—C. N., 629. [I. 481.]

493. He who has the use of land is only entitled to so much of its fruits as is necessary for his own wants and those of his family.

He may even take what is required for the wants of children born to him after the grant of the right of use.—*ff* L. 12, L. 19, *De usu et habitatione;* 2 Boileux, p. 788 ; 2 Marcadé, p. 537 ; Proudhon, n. 2768 ; 2 Maleville, p. 83 ; C. N., 630. [I. 481.]

494. He who has a right of use can neither assign nor lease it to another.—*ff.* L. 2, L. 8, L. 11, *De usu et habitatione ;* 2 Boileux, p. 791 ; 2 Marcadé, p. 538 ; Merlin, vo. *Habitation*, s. 1, § 2, p. 196 ; C. N., 631. [I. 481.]

DECISIONS :—1. Que les droits d'usage et d'habitation stipulés inaliénables avec le consentement du nu propriétaire sont saisissables, et que la saisie n'en peut être opposée que par ce dernier. Tel droit est celui d'un droit immobilier. Action réelle.—C. R.—*Goulet vs Gagnon.* 8 Q. L. R., p. 208.

2. Qu'un usufruit donné à conjoints ne peut être divisé de manière à faire offrir aux enchères publiques la part du mari et à la faire attribuer par adjudication à un étranger qui jouirait ensuite conjointement avec la femme. Qu'une telle division répugne à l'ordre public et est impossible d'exécution.—Q. B.—*Bodard & Anctil*, 13 Q. L. R., p. 67.

495. He who has a right of habitation in a house may live therein with his family, even if he were not married when such right was granted to him.—*ff* L. 2, L. 3, L. 4, L. 5, L. 6, L. 7, L. 8, *De usu et habit ;* Pothier, vo. *Habitation*, n. 18 ; Lamoignon, *Arrêtés*, tit. 35, art. 13, p. 233 ; C. N. 632. [I. 481.]

496. A right of habitation is confined to what is necessary for the habitation of the person to whom it is granted and his family.—*ff loco citato ;* Pothier, *Habitation*, n. 33 ; Merlin, vo. *Habitation* s. 1, § 3, n. 6 ; C. N., 633. [I. 481.]

497. A right of habitation can neither be assigned nor leased.—*ff* L. 8, *De usu et habitatione ;* Instit., *De usu et habitatione*, § 5 Pothier, *Habitation*, n. 18 ; Merlin, vo. *Habitation*, p. 196 ; Proudhon n. 2345 ; C. N., 634. [I. 481.]

DECISION :—Que l'obligation de loger, nourrir, vêtir et entretenir au jour le jour dans la propre maison du débiteur, le créancier d'une rente constitue une créance personnelle et par là même incessible et insaisissable.—C. R.—*Les Sœurs du Précieux Sang vs Dorion*, 31 L. C. J., p. 153.

Digitized by Google

498. If he who has the use take all the fruits of the land, or if he occupy the whole of the house, he is subject to the cost of cultivation, to the lesser repairs, and to the payment of all contributions, like the usufructuary.

If he only take a portion of the fruits, or if he only occupy a part of the house, he contributes in the proportion of his enjoyment. —*ff* L. 18, *De usu et habitatione ;* Serres, *Institutes*, p. 109 ; Pothier, *Habitation*, nn. 21, 22, 23 ; Merlin, vo. *Habitation*, p. 200, s. 1, § 2 ; Proudhon, *Usufruit*, nn. 2762, 2786, 2793, 2823 ; 5 Pand. Franç., p. 340 ; C. N., 635. [I. 483.]

TITLE FOURTH.

OF REAL SERVITUDES.

GENERAL PROVISIONS.

499. A real servitude is a charge imposed on one real estate for the benefit of another belonging to a different proprietor.—*ff* L. 15, § 1, *De servitutibus* ; *Ibid., toto titulo* 8 ; *Instit.*, lib. 2, tit. 3 ; Pothier, *Intr. au tit.* 13, *Cout. d'Orl.*, nn. 2, 3, 4 ; Merlin, Rép., vo. *Servitude*, § 1 ; 2 Maleville, pp. 85-6 ; 7 Locré, *Esp. du Code*, pp. 348-9 et seq. ; 2 Marcadé, p. 557, n. 558 ; C. N., 637. [I. 483.]

500. It arises either from the natural position of the property, or from the law, or it is established by the act of man.—*ff* L. 2, *De aquâ et aquæ* ; 1 Prévost de la Jannès, p. 353 ; Lalaure, *Servitudes*, p, 14 ; 2 Laurière, *sur Paris*, p. 165 ; 2 Maleville, p. 86 ; Rogron, sur art. 639 ; C. N., 639. [I. 483.]

DECISIONS :—1. That the following clause in a deed of sale of land creates a servitude *non ædificandi* in favor of the vendor's neighbouring property : " Il " est encore entendu que toute bâtisse qu'érigera le dit acquéreur sur le dit ter- " rain, sera en ligne avec celle du dit vendeur," and that a subsequent purchaser of the property is thereby prevented from buildiug beyond the said line. Should he so build, the court will order the demolition of that part of the building projecting beyond the said line.—Q. B.—*Hamilton & Well*, 24 L. C. J., p. 49.

Digitized by Google

2. Que dans l'espèce, la défense de moudre du blé et autres grains, excepté l'avoine, dans le moulin de l'appelant, au profit du moulin à farine des intimés, est une servitude réelle.—Q. B.—*Dupuis & Dufresne*, 3 Q. B. R., p. 170.

3. The possessor of a servitude, who is disturbed in his possession, may proceed by possessory action against the disturbing party, and may produce at *enquête* deeds in support of his possession of the servitude which have not been pleaded, such titles being merely to characterize the possession and not to prove that it was founded on title, as would be necessary in a petitory action.—C. R.—*Bélanger vs Dupont*, 10 Q. L. R., p. 221.

See also cases noted at C. C. 501 to 503 & 545.

CHAPTER FIRST.

OF SERVITUDES WHICH ARISE FROM THE SITUATION OF PROPERTY.

501. Lands on a lower level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man.

The proprietor of the lower land cannot raise any dam to prevent this flow. The proprietor of the higher land can do nothing to aggravate the servitude of the lower land.—*ff* L. 1, §§ 13, 23; L. 2, § 1, *De aquâ et aquæ*; Lamoignon, *Arrêtes*, tit. 20, art. 7; Pothier, *Société*, 235-6-7-9; Merlin, Rép., vo. *Eaux pluviales*, nn. 2, 3; 2 Marcadé, pp. 559, 560; 3 Toullier, pp. 356 et seq.; Lalaure, *Servitudes*, p. 19; Carondas, *Pandectes*, liv. 4, c. 22, tit. 1; 2 Bousquet, p. 126; C. N., 640. [I. 483.]

DECISIONS:—1. Qu'une compagnie de chemin de fer qui, par ses travaux de terrassement, empêche l'écoulement des eaux d'une propriété qui longe son chemin, sera reponsable des dommages causés par l'eau à cette propriété.—Q. B.—*Grand Trunk Railway Co & Landry*, 11 R. L., p. 590.

2. By 501 C. C. the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. When the plaintiff being entitled to a flow of water from their lands, executed certain works which had the effect of accumulating the volume of water, and probably, of increasing the depth of the channel, it was held, that, to the extent of such accumulation and consequent increase of flow they had aggravated the servitude of the lower land and to that extent had no right to demand a free course to the water sent down by them.—PRIVY COUNCIL.—*Fréchette & Cie. manufacturière de 'Ste Hyacinthe*, 9 App. Cas., p. 170 28 L. C. J., p. 203, 7 L. N., p. 34, R. A. C., p. 941.—Q. B.—1 Q. B. R., p. 378.

3. B. was an employee of M. a tanner, and after being for some time employed in the tannery, purchased some property opposite the same and on a lower level. An open drain from the tannery passed through the property so purchased by B. which drain was subsequently, through the instrumentality of B. himself, covered over by the corporation, after which an offensive smell was observed to arise from it. B. instituted an action against M. for damage to his property

Digitized by Google

and business caused by the smell from the drain.— *Held.*—That B. was aware of the nuisance complained of when he purchased the property, and that, moreover, he, by procuring the covering of the drain, had aggravated it and in consequence was not entitled to damages.—Q. B.—*McGibbon & Bédard*, 30 L. C. J., p. 282.

See also case of *Weir vs Claude*, noted at article 503, n. 26.

4. The owner of a property has no right of passage over and partial use of his neighbor's property to repair the wall of his house adjoining the other property, without previously indemnifying his neighbor for the probable damage which he may cause in so doing.—C. R.—*Société de Construction Canadienne de Montréal vs Lebrun*, 26 L. C. J.. p. 143.

5. Where the effect of a water course established by a municipal *procès-verbal* was to aggravate greatly the servitude which plaintiff's land had to bear owing to its being lower down than that of his neighbors, it was held that he was entitled to bring suit to have the *procès-verbal* set aside, although he had appealed previously to the County Council and the *procès-verbal* had been confirmed thereby.—Q. B.—*Paroisse de Ste-Anne Bout de l'Ile & Reburn*, M. L. R., 1 Q. B., p. 200.

6. See also case of Q. B.—*Bérard dit Lépine & Corporation du Comté de Berthier*, 29 L. C. J., p. 222.

7. Qu'il n'y a pas lieu à une action en complainte ou négatoire, an cas de l'écoulement naturel des eaux, même augmentées en volume par la culture, d'un héritage supérieur à un héritage inférieur.—Q. B.—*Faucher & Hall*, 11 Q. L. R., p. 15.

8. Que dans l'espèce actuelle, les appelants étaient autorisés par la loi à construire un ponceau sur le chemin qui est sous leur contrôle et qui longe la terre de l'intimé, et il n'y a pas lieu à une action pour faire démolir ce ponceau. Qu'il n'y a aucun dommage prouvé.—Q. B.—*Syndics du Chemin à Barrières de la Rive Sud & Bégin*, 13 Q. L. R., p. 42.

9. Que le propriétaire du fonds supérieur peut, sans violer les dispositions du 501 C. C., élever des constructions sur son fonds et réunir et diriger les eaux qui en découlent vers le fonds inférieur, et que ce dernier fonds est tenu de recevoir ces eaux dont l'écoulement est ainsi modifié, pourvu que le propriétaire du fonds supérieur ne lui transmette pas d'autres eaux que celles qui, avant ces constructions, tombaient naturellement sur son fonds.—MATHIEU, J.—*Hampson vs Vineberg*, 15 R. L., p. 391, M. L. R., 3 S. C., p. 434.

502. He who has a spring on his land may use it and dispose of it as he pleases.—Cod., L. 6, *De servit. et aquâ; ff* L. 1, § 12; L. 21, L. 26, *De aquâ et aque;* Lamoignon, *Arrêtés*, tit. 20, art. 6 Dunod, *Prescriptions*, pp. 88, 89; 2 Henrys, liv. 4, quest. 75; 2 Favard de Langlade, pp. 221 et seq.; 2 Maleville, p. 88; 5 Pand. Franç., p. 368; 7 Locré, pp. 368-9 et seq.; C. N., 641. [I. 483.]

DECISION:—Que le propriétaire d'un terrain sur lequel se trouve une source dont l'eau, en se répandant, forme un petit cours d'eau, qui, grâce à la déclivité du sol, coule naturellement sur la propriété voisine, a seule la propriété de cette eau, à l'exclusion du voisin, et peut détourner et diriger le cours de cette eau comme il l'entend.—ANDREWS, J.—*Demers vs Bureau*, 12 Q. L. R., p. 188.

Digitized by Google

503. He whose land borders on a running stream, not forming part of the public domain, may make use of it as it passes, for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs; saving the provisions contained in chapter 51 of the Consolidated Statutes for Lower Canada, or other special enactments.

He whose land is crossed by such stream may use it within the whole space of its course through the property, but subject to the obligation of allowing it to take its usual course when it leaves his land.—*ff* L. 26, *De damno infecto;* 5 N. Den., vo. *Cours d'eau*, 561, n. 3; Dunod, *Presc.*, p. 88; 2 Henrys, liv. 4, quest. 189; Ord. 1669, tit. 27, art. 44; Guyot, Rép. vo. *Cours d'eau*, pp. 135-6; 2 Basnage, *Servitudes*, p. 489; Merlin, Rép', vo. *Cours d'eau*, n. 3; 1 Demante, n. 661; 2 Bousquet, pp. 130 et seq.; 2 Marcadé, p. 569; 2 Maleville, p. 91; C. N., 644. [I. 483, 485.]

Memo: The chapter of the C. S. L. C. cited in the article, enacts as follows :—

1. Every proprietor of land may improve any water-course bordering upon, running along or passing across his property and may turn the same to account by the construction of mills, manufactories, works and machinery of all description, and for this purpose may erect and construct in and about such water-course, all the works necessary for its efficient working, such as flood-gates, canals, embankments, dams, dykes and the like.

2. The proprietors or lessees of any such works shall be liable for all damages resulting therefrom to any person whomsoever, whether by the too great elevation of the flood-gates or otherwise.

3. Such damages shall be ascertained by experts to be appointed by the parties interested, in the ordinary manner; and in default of either of the said parties to appoint such expert, one of the experts of the municipality, to be elected by the warden, shall act; in case of difference of opinion, the two experts oppointed shall choose a a third; the experts shall be sworn before a justice of the peace faithfully to perform their duties as such; in assessing the damages and fixing the compensation to be paid, the experts, if the case requires it, may set off against the whole or any part of such damages, any increased value which the property of the claimant has acquired by roason of the erection of such works, mill, manufactories or machinery.

4. In default of payment of the damages and indemnity so awarded within six months from the said date, the party by whom the payment is due shall demolish the works which he shall have

Digitized by Google

erected, or they shall be so demolished at his cost and charges, upon judgment to that effect rendered, the whole without prejudice to the damages and interest already incurred.—C. S. L. C., cap. 51.

DECISIONS :—1. A seignieur, by his grant from the Crown, acquires a right of property in the soil over which a river, not navigable, flows, but in the running water he has only a right of servitude while it passes through or before the land he retains in his possession, which does not authorize him to divert the stream or use the water to the prejudice of other proprietors above or below him. An action by a seignieur against his co-seignieur for the improper use of the common estate, can be maintained.—COURT OF APPEALS.—*Gadioux St-Louis & Gadioux St-Louis*, Stuart's Rep., p. 575.

2. An action in *factum* can be maintained against a neighbouring proprietor for impeding a water course to the plaintiff's prejudice.—K. B.—*Harrower vs Babin*, 2 R. de L., p. 469.

3. The owner of a mill site is entitled to a judgment affirming his right to the enjoyment of the use of the water of a stream in its natural course which has been diverted by a neighbour for the purpose of turning a mill upon his own land, although at the time of the action the party complaining had no mill and did not require the use of the water.—C. R.—*Bussière vs Blais*, 7 L. C. R., p. 245.

4. When two proprietors upon the same stream possess water powers of which one cannot be improved without the destruction of the other, the first occupant must have the preference and is entitled to have an abatement of the dam of the other.—C. R.—*Dunkerly vs McCarty*, 8 L. C. R., p. 132.

5. A superior mill owner has no right to obstruct a river which is both navigable and floatable and used for floating timber, by constructing a boom across such river and parties owning mills lower down the river, whose logs are detained by such boom, have a right, after reasonable notice and demand to be allowed to pass with their logs, to open the boom and allow their own logs to pass down the river, and they are not responsible for damages caused thereby to the person obstructing the river by reason of the logs being carried down the stream.—SHORT, J.—*Chapman vs Clark*, 8 L. C. R., p. 147.

6. By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of deficiency, upon proprietors lower down the stream. He has a right further to the use of it for other purposes, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill or divert the water for the purposes of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful uses of the water by other proprietors and inflicts upon them a sensible injury. *Semble* for the purposes of this case, it does not appear that any material distinction exists between the French and the English law.—PRIVY COUNCIL.—*Minor & Gilmour*, 9 L. C. R., p. 115; 12 Moore's P. C. Rep. p. 131.

7. Un propriétaire n'a pas le droit, sous les dispositions de la 19-20 Vict., ch. 104, d'ériger sur un cours d'eau, une chaussée aboutissant sur la terre du pro-

Digitized by Google

priétaire vis-à-vis ; et une chaussée ainsi érigée sera démolie à la demande de ce dernier.—CHABOT, J.—*Joly vs Gagnon*, 9 L. C. R., p. 166.

8. Rivers non-navigable and non-floatable are the private property of the riparian proprietors, who consequently have exclusive control over the same. The Jacques Cartier river, being non-navigable and non-floatable, the riparian proprietors have consequently the exclusive right of fishing therein.—Q. B.—*Boswell & Denis*, 10 L. C. R., p. 294.

9. Les parties étaient toutes deux propriétaires riverains séparés par la rivière Beauport. En 1850, le demandeur construisit un quai sur sa propriété. En octobre 1852, le défendeur en fit autant de son côté, sur quoi, dans le même mois d'octobre, le demandeur porta son action réclamant : 1. des dommages, 2. démolition du quai construit par le défendeur.—*Jugé :* 1. Que si, dans l'espèce, la construction du quai du défendeur était de nature à causer au demandeur des dommages, il n'en avait éprouvé aucun lorsqu'il introduisit son action. 2. Que la demande en démolition du quai du défendeur ne pouvait être admise qu'en autant qu'il serait établi que ce quai avait été construit, en tout ou en partie, sur le lit de la rivière. 3. Que tout propriétaire riverain a droit de protéger les rives de son héritage, et de reconquérir par la construction de quais, ou autrement, ce que l'action des eaux lui a enlevé ; pourvu que l'exercice de ce droit n'apporte au cours des eaux aucun changement préjudiciable au voisin.—Q. B.—*Brown & Gugy*, 11 L. C. R., p. 401.

10. Obstructions to navigable rivers are public nuisances and no action by an individual lies for such nuisance unless such individual suffers special and particular damage. In the case submitted, the action *en destruction de nouvel œuvre* did not lie, inasmuch as such action can only be brought by a party claiming protection against a work commenced and still in progress by which, if completed, he alleges he will be injured.—PRIVY COUNCIL :—*Brown & Gugy*, 14 L. C. R., p. 213 ; 2 Moore's, P. C. Rep., N. S., p. 341.

11. A boom stretched across a floatable stream or river is a public nuisance and as such may be abated by any person.—Q. B. —*Reg. vs Patton*, 13 L. C. R., p. 311.

12. Riparian proprietors in adjacent lots, but holding under the same original title, may make such compacts or stipulations with respect to the use of the water of the stream or the river flowing along their properties respectively, as they may think proper. The natural use of flowing water under the common law cannot be obstructed by artificial means or by the agreement or stipulations of riparian proprietors. —C. R.—*Hamel vs The Mayor et al.*, 16 L. C. R., p. 129.

13. Dans une action portée par un seigneur, alléguant son titre et son droit de banalité, concession à l'un des défendeurs d'une terre dans sa seigneurie, avec clause dans le contrat qu'aucun moulin ne serait érigé ; les défendeurs, associés avaient construit un moulin à scie sur une rivière non-navigable avoisinant le terrain concédé, et avaient érigé une chaussée sur la rivière, qui faisait refluer les eaux sur le moulin à scie et le moulin à farine du demandeur qui avaient été en opération pendant plus de trente ans, et qui empêchait le fonctionnement des moulins, et causait de grands dommages. *Conclusion.* Qu'il fût déclaré que les défendeurs n'avaient aucun droit d'ériger un moulin à scie ou aucun autre moulin, que la chaussée fût démolie, et les défendeurs condamnés en dommages. *Jugé :* Que par le statut de la 20e Vict., ch. 104, le demandeur n'avait pas droit à des conclusions en démolition, qu'il n'avait aucun droit à l'usage exclusif des

Digitized by Google

eaux, et que les défendeurs étaient responsables des dommages causés par la hauteur de leur chaussée ou autrement. *Expertise* ordonnée, afin de constater si la chaussée et autres ouvrages des défendeurs causaient des dommages au demandeur, et pour en estimer le montant si aucun il y avait.—SMITH, J.—*Pangman vs Bricault dit Lamarche*, 3 R. L., p. 278.

14. Par l'acte des Statuts Refondus B. C., chap. 51, un propriétaire a le droit d'utiliser une rivière traversant son immeuble et celui de son voisin, en y construisant chez lui des moulins et chaussées, et de les vendre ensuite à un tiers, qui, lui aussi, a encore le droit de les exploiter. Si ces chaussées ont causé, par leur trop grande élévation, des dommages au voisin, il doit les faire constater par des experts à être nommés par lui et le propriétaire de la chaussée, et à défaut par l'un d'eux d'en nommer, par l'un des experts de la municipalité à être désigné par le préfet du comté, lesquels experts, en évaluant ces dommages et fixant une indemnité, peuvent, s'il y a lieu, établir une compensation en tout ou en partie, avec la plus-value qui peut résulter à l'immeuble du voisin, par l'établissement de ces moulins. Cela fait, et à défaut du paiement de ces dommages ainsi constatés et fixés, dans les six mois de la date du rapport des experts, avec l'intérêt légal, à compter de la dite date, le voisin a alors le droit de poursuivre pour le recouvrement du montant déjà fixé de ces dommages avec intérêt, et pour faire démolir la chaussée, ou se faire autoriser à la démolir aux frais et dépens du propriétaire. Le voisin n'a pas droit d'action contre le propriétaire, pour faire constater s'il a ou non souffert des dommages, et s'il y en a, à combien ils se montent, attendu que l'acte sus-mentionné prescrit un mode différent de le faire, et il ne peut demander la démolition de la chaussée qu'en autant qu'il aura été constaté par des experts qu'il a droit à des dommages, que ces dommages auront été évalués, et qu'ils n'auront pas été payés, avec l'intérêt légal, dans les six mois de la date du rapport des experts.—SUPERIOR COURT.—*Blais vs Auger*, 3 R. L., p. 272.

15. Les pouvoirs donnés à une corporation de faire un aqueduc et tous les travaux nécessaires pour introduire l'eau dans une localité, ne lui donnent pas le droit de faire des constructions nuisibles à la navigation sur une rivière navigable. Pour se plaindre de semblables constructions, un simple particulier doit établir qu'il souffre un préjudice direct et immédiat et la cour ne prendra pas en considération de prétendus dommages futurs et éventuels.—DORION, J.—*Bell vs Corporation de Québec*, 2 Q. L. R., p. 305.

16. Action for obstructing a navigable river. *Per curiam*, no person can obstruct a navigable river with impunity, and plaintiff was awarded £50 for injury done his raft. The removal not ordered, as the obstruction became more properly the object of public prosecution, and that part of demand dismissed.—SUPERIOR COURT.—*Stein vs Seath*, 3 R. L., p. 457.

17. Qu'un propriétaire n'a pas le droit d'ériger sur une rivière une chaussée. aboutissant sur la terre du propriétaire riverain du côté opposé de la rivière. Que le propriétaire de la terre sur laquelle vient aboutir une telle chaussée, a le droit d'en obtenir la démolition depuis sa rive, inclusivement, jusqu'au fil de l'eau, c'est-à-dire, jusqu'au milieu de la rivière, telle rivière étant ni navigable ni flottable autrement qu'à bûches perdues.—PAPINEAU, J.— *Geoffrey vs Beausoleil*, 9 L. N., p. 402.

18. Third parties have the right under C. S. U. C. cap. 48,s ec. 15 (12 Vict. cap 87, sec. 5) to float logs down a river which has been rendered floatable only

Digitized by Google

by the improvement, effected by a rivarian proprietor.—PRIVY COUNCIL.—*Caldwell & McLaren*, 9 App. Cas., p. 392, 28 L. C. J., p. 240.—SUPREME COURT.—8 S. C. R., p. 435, 5 L. N., p. 393.

19. Que sur une rivière propre à la descente de billots à bûches perdues et sur laquelle sont construits des écluses, quais et autres travaux, les propriétaires des écluses doivent ne pas entraver la libre descente des billots, de même que ceux qui opèrent la descente de billots sont tenus de conduire ceux-ci de manière à ne pas endommager les écluses construites sur la rivière.—Q. B.—*King & Ouellet*, 14 R. L., p. 331.

20. The proprietors of inferior lands on a stream have an action of damages against the proprietor of the superior lands, for any interference with the flow of water which aggravates the servitude to which the inferior lands are subject.—Q. B.—*Cournoyer-Paulet & Guévremont*, 7 L. N., p. 308.

21. Que le Statut 19 et 20 V., c. 104, qui permet aux propriétaires l'exploitation des cours d'eau sur leur terre, pour y construire des moulins et des écluses, crée une servitude légale sur les terres voisines, sur lesquelles les écluses font refluer les eaux. Leurs propriétaires n'ont droit qu'à une indemnité ; ils ne peuvent obtenir la démolition des travaux que si l'indemnité en compensation n'a pas été payée, et que cette exploitation ne constitue pas un délit.—C. R.—*Jean vs Gauthier*, 5 Q. L. R., p. 138.

22. Que celui qui a fait construire là où il existe déjà une écluse temporaire, une autre écluse permanente et plus élevée que la première, est responsable des dommages qu'il cause au propriétaire dont les terres sont inondées par l'effet de cette écluse. Que cette responsabilité existe encore que le plaignant aurait lui-même cédé l'immeuble où était située la première écluse, avec la faculté au cessionnaire d'y construire une écluse pour le fonctionnement d'une scierie. Que celui qui a fait construire une chaussée permanente, là où il n'en existait que temporairement, est responsable pour les dommages qu'il cause annuellement au propriétaire dont les terres sont inondées par l'effet de cette chaussée.—Q. B.—*Carter & Breakey*, 15 R. L., p. 513.—CASAULT, J.— 7 Q. L. R., p. 286.

This judgment was reversed, however, on an unpleaded question of prescription in the Supreme Court ; C. D., p. 258.

23. Que le propriétaire d'un moulin qui fait marcher les eaux d'une rivière non-flottable, a une action pour les dommages que lui cause la retenue des eaux par écluses, pour les besoins d'un moulin de construction plus récente, en amont de la même rivière.—C. R.—*Proulx vs Tremblay*, 7 Q. L. R., p. 353.

24. Que celui dont la propriété borde une eau courante, ne faisant pas partie du domaine public, peut utiliser et exploiter cette eau en y construisant une chaussée d'une hauteur suffisante pour faire marcher le moulin qu'il a construit sur sa propriété : et, que le propriétaire d'un moulin supérieur, auquel ces travaux nuisent, en y faisant refluer les eaux, ne peut demander qu'une indemnité, et n'a droit à la démolition des travaux qu'à défaut du paiement de l'indemnité.—C. R.—*Demers vs Germain*, 11 Q. L. R., p. 143, 14 R. L., p. 369.

25. In this case the Appellant was ordered to lower his embankment on the river, as the construction of it interfered with the working of a mill higher up the river.—Q. B.—*Bougie & Symons*, 4 Q. B. R., p. 223.

26. That where the proprietor of a tannery, for the purpose of his industry, makes such use of a water-course as to render the water unfit for domestic purposes and dangerous to health, and to deprive the proprietors of the land border-

Digitized by Google

ing on such stream of the use and enjoyment of same, damages ($500 in this case) will be granted against him, and also an injunction restraining him from such misuse of the stream.—JOHNSON, J.— *Weir vs Claude*, M. L. R., 2 S. C., p. 326, 31 L. C. J., p. 39. (Reversed in Appeal, 32 L. C. J., p. 213, but carried to the Supreme Court).

27. Depuis au delà de trente ans, au moyen d'une saignée pratiquée dans la Rivière Port-Joli en amont du terrain du demandeur, le défendeur détournait, sans la rendre ensuite à son cours naturel, et au préjudice du demandeur, une partie des eaux de la dite rivière. Le demandeur l'a poursuivi au moyen d'une action négatoire pour faire cesser ce détournement.—*Jugé:* Que le défendeur n'ayant pour justifier l'exercice de cette servitude aucun titre émanant du demandeur ou de ses auteurs, le détournement qu'il faisait était illégal et défense lui est faite de continuer l'exercice de la dite servitude et ordre lui est donné de faire tous les travaux requis pour rendre au cours naturel toutes les eaux de la dite rivière.—ANGERS, J.—*Bélanger vs Dupont*, 13 Q. L. R., p. 115.

28. He who constructs a dam upon a floatable river is liable in damages to the owner of the land on a higher level which may be flooded by reason of such dam, but such owner cannot demand the unconditional demolition of the dam. The provision of chapter 51 C. S. L. C., apply to floatable as well as non-floatable rivers and a dam, not actually working the river, but constructed to provide a reserved supply of water for the mill-dam, will be held an "improvement" under the terms of the statute.—Q. B.—*Currie & Adams*, 14 Q. L. R., p. 169.

504. Every proprietor may oblige his neighbour to settle the boundaries between their contiguous lands.

The costs of so doing are common; those of the suit, in case of contestation, are in the discretion of the court.—Cod. L. 5, *Communi dividundo*; Pothier, *Société*, 231-2-3; 1 Fournel, *Voisinage*, p. 240; 3 N. Den., vo. *Bornage*, p. 654-5; 2 Bousquet, pp. 134 et seq.; 2 Maleville, p. 93; 5 Pand. Franç., p. 379; 3 Toullier, n. 180; 1 Pardessus, *Servitudes*, n. 129; 3 Sebire et Carteret, p. 250; Millet, *Bornage*, p. 552; Solon, *Servitudes*, p. 87, n. 78; C. N., 646. [I. 485.]

DECISIONS.—1. Evidence of an existing *borne* without further testimony affords no proof of title of any description—K. B.—*Thibault vs Rancourt*, I R. de L., p. 354.

2. In *bornage* the defendant may claim and prove title by prescription and possession *outre son titre;* but he cannot claim *contre son titre*.—K. B.—*Thériault vs Leclerc*, I R. de L., p. 354.

3. The action of *bornage* cannot be maintained if the lands of the plaintiff and defendant are separated by a public highway.—K. B.—*Blanchet vs Jobin*, I R. de L., p. 354.

4. The defendant in an action of *bornage*, if he holds in right of another, must set forth the fact by exception, and the name and residence of the person for whom he holds.—K. B.—*Fortier vs Rhinhart*, 1 R. de L., p. 354.

5. Il y a lieu à une demande en bornage entre voisins, lorsque les traces d'un premier bornage et placement de bornes ont disparu, les terrains n'étant divisés que par une clôture d'embarras.—Q. B.—*Lanouette & Jackson*, 7 L. C. R., p. 362

Digitized by Google

6. Dans une action en bornage le défendeur ne peut être condamné à contraindre ses voisins à borner avec lui, et un allégué et des conclusions à cet effet seront renvoyés sur défense au fond en droit.—CHABOT, J.—*Fradet vs Labrecque*, 8 L. C. R., p. 218.

7. In an *action en bornage*, the existence of a fence between the two properties for upwards of 30 years before action brought, entitles the defendant to claim such fence as the legal boundary or division line between the properties. Although such fence be so constructed as to form an irregular encroachment on the plaintiff's land, to the depth of about 7 feet by about 48 feet only in length along a portion of the line of division between the properties, and although the title deed of the defendant and the title deeds of all his *auteurs*, show the line of division between the properties to be a straight line, throughout its entire length, and are silent as to the encroachment, and although defendant's possession only dates back a little over 4 years, he nevertheless can avail himself of the possession up to the fence, of all those from whom he derives title to the property described in the deeds. Verbal evidence, to the effect that the fence had been for upwards of 30 years in the same line as it was at the time of the action, is sufficient, although it be proved that such fence was entirely destroyed by fire and remained destroyed for upwards of a year, and none of the witnesses testify to having seen a vestige of the old fence after the fire, or to having been present when the new fence was built.—Q. B.—*Eglaugh & Montreal General Hospital*, 12 L. C. J. p. 39.

8. Une action en bornage alléguant que le défendeur est voisin d'un côté sera maintenue, même s'il est prouvé que le défendeur n'est voisin que d'un autre côté de la terre du demandeur. Le défendeur qui, dans une action en bornage, plaide par une défense en fait, sera condamné aux frais. L'arpenteur n'est pas tenu dans un rapport sur action en bornage, de constater que les parties ont signé ou ont été requises de le faire.—Q. B.—*Bouffard & Nadeau*, 8 R. L., p. 321.

9. In an *action en bornage*, where a division fence had existed for upwards of thirty years between the properties to be *bornées*, and one of the parties had enjoyed his possession "*franchement, publiquement et sans inquiétation*" for that period, he had a right to demand that the boundary be drawn according to his line.—TORRANCE, J.—*Pattenaude vs Charron*, 17 L. C. J., p. 85.

10. Si les bornes d'un héritage ne sont pas établies, le propriétaire qui se plaint d'empiètement de la part de son voisin, doit avoir recours à l'action en bornage et non à l'action au pétitoire.—Q. B.—*Graham & Kempley*, 2 R. C., p. 106.

11. Witnesses examined before a properly appointed *arpenteur expert* cannot be heard as witnesses before the Court, without permission.—MEREDITH, J.—*Plante vs Legendre*, 6 Q. L. R., p. 201.

12. Que le jugement interlocutoire dans une action en bornage, ordonnant le bornage, doit indiquer l'endroit où les bornes doivent être placées, et qu'un arpenteur qui procède à tirer une ligne de division et placer des bornes entre les propriétés respectives des parties dans une action en bornage, doit procéder avec le consentement des parties, et il doit observer les formalités requises par la loi si le jugement n'ordonne pas le bornage à un endroit déterminé et s'il n'y a pas eu de rapport préalable pour constater où le bornage devait être fait.—Q. B.—*Brown & Perkins*, 10 R. L., p. 427, 6 Q. L. R., p. 143.

13. Various questions of procedure in *bornage* cases decided.—MATHIEU, J.—*Forest vs Heathers*, 11 R. L., p. 7.

Digitized by Google

14. Different questions in *bornage cases* decided.—Q. B.—*Loiselle & Paradis*, 1 Q. B. R., p. 264.

15. Que sur une action *en bornage* les parties ont le droit de faire une preuve orale et par titres, même après le rapport de l'arpenteur chargé de vérifier les limites des héritages des parties, surtout si ce rapport reconnaît l'existence de deux lignes et n'établit pas, à la satisfaction de la Cour, quelle est celle des deux qui doit être suivie.—Q. B.—*Boisvert & Mastine*, 3 Q. B. R., p. 72.

16. The sugary in question was situated on a lot of land whereof the Plaintiff was proprietor of the South half and the Defendant of the North half, there being no boundary between the two half lots. *Held:*—That the Plaintiff having peaceably enjoyed his property for seventeen years, was under no obligation to bring an action *en bornage* but when dispossessed by defendant he could proceed *en réintégrande*.—C. R.—*Gerbeau vs Blais*, 7 Q. L. R., p. 13.

17. Que toutes les dépenses de l'instance rendue nécessaire par les prétentions de l'une des parties, doivent être mises exclusivement à sa charge, quoiqu'elle ne se soit pas autrement refusée au bornage, et qu'elle n'ait pas plaidé à l'action, et que les frais d'expertise et de bornage sont les seuls qui doivent être également partagés.—C. R.—*Roy vs Gagnon*, 7 Q. L. R., p. 207.

18. Que les frais de l'instance en bornage ne doivent pas être partagés entre les parties en litige, mais qu'ils doivent être supportés en entier par celui qui s'est refusé à un bornage à l'amiable ou qui l'a rendu impossible par des prétentions que rejette le jugement.—Casault, J.—*Bélanger vs Giroux*, 9 Q. L. R., p. 249.

19. Que le vendeur à réméré qui a resté en possession, a continué à se faire passer pour le propriétaire, en a exercé les droits et est publiquement reconnu comme tel, ne peut être mis hors de cause, sur une action en bornage, par le propriétaire, qu'en payant les frais d'action. Que le vendeur à réméré conserve un *jus in re* dans la chose vendue, et que le voisin peut le joindre à l'acheteur dans une demande en bornage.—Casault, J.—*Lemieux vs Lemieux*, 10 Q. L. R., p. 365.

20. Qu'une motion demandant l'homologation d'un rapport d'arpenteur expert dans une action en bornage, de même que la motion demandant l'homologation du procès-verbal, doit être signifiée à la partie adverse, avec le délai ordinaire, quand même la partie adverse n'a pas plaidé à l'action.—Q. B.—*Blackburn & Blackburn*, 11 Q. L. R., p. 305.

21. The buyer of an immoveable property, when sued in an action *en bornage*, containing at the same time petitory conclusions has a right to proceed *en garantie* against the vendor.—C. R.—*Blackburn vs Blackburn*, 11 Q. L. R., p. 170.

22. Que lorsque la possession de deux propriétés voisines n'est pas déterminée et rendue certaine par des marques visibles et fixes, le seul recours de leurs possesseurs à titres de propriétaires, est en bornage, et que l'action en complainte pour empiètements doit être renvoyée.—C. R.—*Lacroix vs Ross*, 11 Q. L. R., p. 78.

23. Que lorsqu'une propriété a déjà été bornée, à frais communs et du consentement des deux parties, lesquelles ont signé le procès-verbal, l'une de ces parties ne pourra demander à son voisin un nouveau bornage, sans alléguer des raisons sérieuses montrant l'insuffisance ou l'irrégularité du premier.—C. R.—*Nadeau vs St. Jacques*, M. L. R., 1 S. C., p. 302, 13 R. L., p. 321.

24. Que la partie poursuivie en bornage sera condamnée à payer seule tous les frais de l'action, nonobstant sa déclaration qu'elle est prête à borner suivant l'ordre de la cour.—Q. B.—*Thornton & Trudel*, 30 L. C. J., p. 202, 14 R. L., p. 286.

25. Que pour maintenir une action en bornage, il faut que le Demandeur

Digitized by Google

prouve son droit de propriété ou au moins sa possession civile.—Q. B.—***Mann & Hogan***, 11 R. L., p. 334.

25. Que dans une action en bornage, si l'un des voisins a trop de terrain et l'autre pas assez, il faut parfaire, sauf toujours l'exception de prescription, la part de ce dernier avec l'excédant du premier. Que celui qui jouit d'une contenance aussi étendue que celle mentionnée dans son titre, ne peut opposer à son voisin, qui le poursuit en bornage, que la ligne véritable entre lui et son autre voisin n'est pas la ligne véritable, vû que ce dernier n'a pas la terre mentionnée dans son titre, s'il ne met pas son autre voisin en cause pour constater cela.—MATHIEU, J.— ***Boulet vs Bourdon***, 12 R. L., p. 121.

26. Que si, après l'institution d'une action en bornage, les parties font un compromis et un bornage à l'amiable, il ne sera plus fait de procédés dans la cause. —SUPERIOR COURT.—(Judge's name not given.) ***McFaul vs McFaul***, 12 R. L., p. 597.

27. Les auteurs des appelants ont acheté un certain lopin de terre (location minière) décrit dans l'acte par superficie et par tenants et aboutissants " avec la " faculté de changer la course des lignes et bornes, sans en augmenter l'étendue " en suivant la course de la veine de quartz." JUGÉ :—Que, si ces auteurs ont exercé cette faculté de changer la course des dites lignes et bornes et ont fait dresser un plan et posé des bornes en conséquence, les arpenteurs experts nommés en justice pour borner le dit lopin doivent suivre ces mêmes plans et bornes.—Q. B.—***McArthur & Brown***, 13 Q. L. R., p. 168.

(This case has been carried to the Supreme Court).

28. The omission by a surveyor to annex to his official report the exhibits produced by the parties is not a cause of nullity and he may be ordered to rectify the omission.—Q. B.—***Pacaud & Les Curés et Marg. de l'Œuvre et Fab. de la Par. de St. Eusèbe de Stanfold***, 16 R. L., p. 104.

29. Que lorsque, dans une action en bornage, deux arpenteurs sont nommés experts, pour faire un plan des héritages des parties et indiquers leurs prétentions respectives, un de ces arpenteurs peut, outre le rapport conjoint fait avec l'autre, faire un rapport spécial, et que ce rapport spécial ne sera pas rejeté, comme irrégulier, s'il contient des explications nécessaires pour permettre au tribunal de déterminer la position de la ligne qui doit diviser les héritages. Que le placement, par arpenteur, de deux bornes avec procès-verbal, dans une ligne, pour en déterminer la course ou alignement indiqué, d'une manière permanente, la ligne qui doit diviser ces terrains, non seulement à l'endroit où se trouve les dites bornes, mais sur toute la profondeur des héritages, et qu'à moins d'une possession contraire établie, la possession du terrain, jusqu'aux bornes, suppose la possession sur toute la profondeur des lots jusqu'à la ligne dont les dites bornes indiquent la course, et que cette possession présumée peut servir de base à la prescription. Que lorsque, dans une action en bornage, il est constaté, par la preuve, que les parties ne pouvaient s'entendre, pour borner leurs héritages, et que, dans l'intérêt des deux, il était nécessaire que l'une ou l'autre d'entre elles eût recours à une action en bornage, les frais de l'action en bornage, tant sur la demande que sur la défense, doivent être considérés comme frais nécessaires faits dans l'intérêt des deux parties et être divisés également entre elles.—Q. B.— ***Cormier & Leblanc***, 16 R. L., p. 288, 14 Q. L. R., p. 247.

505. Every proprietor may oblige his neighbour to make in equal portions or at common expense, between their respective lands,

Digitized by Google

a fence, or other sufficient kind of separation according to the custom, the regulations and the situation of the locality. — 2 Edits et Ord., pp. 272, 424; 13 et 14 Vict., c. 40, sec. 2-9; C. S. L. C., c, 26, ss. 32, 33; Paris, art. 209-213; 5 Pand. Franç., pp. 394 et seq., 2 Maleville, 93-4; Pothier, *Cout, d'Orl., Int. au tit.* 5; 3 Guyot, Rép. vo. *Clôture*, pp. 596 et seq.; 4 N. Den., vo. *Clos*, p. 571 et seq.; C. N., 647, 648. [I. 485.]

DECISIONS:—1. The 194th article of the custom enables a proprietor to compel his neighbour to build a *mur mitoyen* between them. Therefore where the plaintiff brought his action in *assumpsit* for money laid out and expended in erecting a *mur mitoyen* with his neighbour's implied consent, it was held that he was entitled to recover.—K. B.—*Latouche vs Latouche*, 1 R. de L., p. 353.

2. L'art. 8 de la sect. 32 du chap. 26 des S. R. B. C., est encore en force.—L'art. 774 C. M. ne détruit pas les rapports de voisinage, et spécialement l'obligation de clore entre voisins dans le cas prévu par le dit art. 8 ci-dessus mentionné.—OLIVIER, J.—*Ayet vs Pelland*, 5 R. L., p. 279.

3. Que le propriétaire d'une terre, renfermée par une clôture, qui convient avec son voisin de faire tirer une ligne entre leurs héritages respectifs, ne perd pas pour telle convention le droit à l'action possessoire, pour trouble à lui causé sur sa terre, surtout, si la ligne qui est tirée n'est pas acceptée par le demandeur. Que le voisin dont la possession est publique et non équivoque pendant l'an et jour, a droit à l'action possessoire en complainte contre le voisin dont la terre est séparée de la sienne par une clôture et qui le trouble dans la possession de sa terre en dedans de la clôture.—MATHIEU, J.—*Robitaille vs Joly*, 11 R. L., p. 347.

CHAPTER SECOND.

OF SERVITUDES ESTABLISHED BY LAW.

506. Servitudes established by law have for their object public utility or that of individuals.—C. N. 649. [I. 485.]

DECISION:—The depreciation caused to a house, by stopping one end of the street on which it fronts, is not an interference with a servitude nor, standing alone, such direct and immediate damage as will give title to indemnity.—PRIVY COUNCIL.—*Mayor of Montreal & Drummond*, 22 L. C. J., p. 1, 1 App. Cas., p. 384, R. A. C., p. 1004.

507. Those established for public utility have for their object the foot-road or tow-path along the banks of navigable or floatable rivers, the construction or repair of roads or other public works.

Whatever concerns this kind of servitude is determined by particular laws or regulations.—C. N., 650. [I. 485.]

DECISION:—Expropriation, by Act of Parliament, for the purpose of widening a street, is a servitude established by law.—MATHIEU, J.—*Mesnard vs Rambeau*, M. L. R., 4 S. C., p. 25, 16 R. L., p. 97.

Digitized by Google

508. The law subjects proprietors to different obligations with regard to one another independently of any stipulation.—C. N., 651. [I. 485.]

509. Some of these obligations are governed by the laws concerning municipalities and roads.

The others relate to division walls and ditches, to cases where a counter-wall is necessary, to views upon the property of a neighbour, to the eaves of roofs, and to rights of way.—C. N., 652. [I. 485.]

SECTION I.—OF DIVISION WALLS AND DITCHES, AND OF CLEARANCE.

510. Both in town and country, walls serving for separation between buildings up to the required heights, or between yards and gardens, and also between enclosed fields, are presumed to be common, if there be no title, mark or other legal proof to the contrary.—Paris, 211; Lamoignon, *Arrêtés*, tit. 20, art. 30; Pothier, *Obl.*, 844; *Société*, 201-6; *Orl.*, tit. 13, art. 234; Merlin, vo. *Mitoyenneté*, § 1, nn. 2-5; 2 Maleville, 95-6; 1 Demante, 361; 5 Pand. Franç., 404-5-7; 7 Locré, pp. 410 et seq.; 2 Marcadé, p. 575; C. N., 653. [I. 485.]

DECISIONS:—1. *Mitoyenneté* between adjoining properties is a presumption of law which imposes upon the objector the necessity of rebutting it. Rebuttal can only be established by titles or, in default of titles, by certain *marques*. In the case submitted no original titles or *marques* exist showing *mitoyenneté* in the wall in question. *Non-mitoyenneté* is established by title between the plaintiff and defendants whereby the latter admit the plaintiff's property in the wall.—Badgley, J.—*McKenzie vs Têtu*, 12 L. C. R., p. 257.

2. Preuve testimoniale est inadmissible pour établir le consentement du voisin à l'érection et au placement d'un mur mitoyen.—Sicotte, J.—*Leduc vs McShane*, 29 L. C. J., p. 56.

See also cases noted at C. C. 520.

511. It is a mark that a wall is not common when its summit is straight and plumb with the facing on one side, and on the other exhibits an inclined plane; and also when one side only has a coping, or mouldings, or corbels of stone, placed there in building the wall.

In such cases the wall is deemed to belong exclusively to the proprietor on whose side are the eaves or the corbels and mouldings. —Paris, 214; Desgodets, p. 390; 1 Lepage, pp. 43-4; Lamoignon, tit. 73, art. 31; 5 Pand. Franç., p. 409; 2 Maleville, pp. 96-7; 1 Demante, 361; 2 Marcadé, p. 577; C. N., 654. [I. 487.]

Digitized by Google

DECISION :—A right of *mitoyenneté* cannot be established by more verbal evidence, when there is no title and the marks on the wall do not indicate any such right.—Badgley, J.—*Rodier vs Tait*, 1 L. C. L. J., p. 70.

512. The repairing and rebuilding of a common wall are chargeable to all those who have any right in it, in proportion to the right of each.—Paris, 205; Pothier, *Société*, 219, 220-2; Desgodets, pp. 278 et seq.; 3 Toullier,, pp. 131-133; Merlin, vo. *Mitoyenneté*, § 2, n. 1; 5 Pand. Franç., pp. 409 et seq.; C. N., 655. [I. 487.]

DECISION :—An action for money paid and advanced, may be maintained by a proprietor of a *mur mitoyen* against his co-proprietor for his proportion of the sum expended in the repairs of the wall, if the latter has impliedly acquiesced in the making of such repairs.—K. B.—*Latouche vs Rollman*, Stuart's Rep., p. 151.

513. Nevertheless every co-proprietor of a common wall may avoid contributing to its repair and rebuilding by abandoning his share in the wall and renouncing his right of making use of it.—Paris, 210; Desgodets, p. 377; Pothier, *Société*, n. 221; 2 Marcadé, pp. 378-9; 2 Maleville, p. 97; 5 Pand. Franç., p. 416; C. N., 656. [I. 487.]

514. Every co-proprietor may build against a common wall and place therein joists or beams, to within [four inches] of the whole thickness of the wall, without prejudice to the right which the neighbour has to force him to reduce the beam to the half thickness of the wall, in case he should himself desire to put beams in the same place, or to build a chimney against it.—*ff* L. 52, § 13, *Pro socio;* L. 12, *Communi dividundo;* Paris, 198, 207, 208: Orléans, 232; Pothier, *Société*, 207-8-9; Desgodets, pp. 205 et seq.; Lamoignon, tit. 20, arts. 36-7; 5 Pand. Franç., 416; 2 Maleville, 98; 1 Lepage, 58; 7 Locré, 421; C. N., 657. [I. 487.]

515. Every co-proprietor may raise the common wall at will, but at his own cost, upon paying an indemnity for the additional weight imposed, and bearing for the future the expense of keeping it in repair above the height which is common.

The indemnity thus payable is the sixth of the value of the superstructure.

On these conditions such superstructure becomes the exclusive property of him who built it; but it remains, as to the right of view subject to the rules applicable to common walls.—Paris, 195, 197; 2

Digitized by Google

Laurière, 172; Desgodets, 168, 194; Lamoignon, tit. 20, art. 29; Pothier, *Société*, 200, 212, 213, 222; 2 Maleville, 98-9; 5 Pand. Franç., 418; 2 Marcadé, 579, 580; C. N., 658. [I. 487.]

DECISIONS:—1. Que lorsque deux propriétaires riverains ont fait une clôture mitoyenne, chacun pour moitié, un des propriétaires a le droit d'enlever la clôture faite par son voisin pour la remplacer par le mur de sa maison, mais que dans ce cas, il doit remettre la clôture qu'il a enlevée au propriétaire qu'il l'avait faite ou lui en payer la valeur—LORANGER, J.—*Desjardins vs Rochon*, 10 L. N., p. 117.

2. Que le voisin co-propriétaire d'un mur mitoyen, a le droit d'exhausser ce mur, à ses dépens, en payant l'indemnité pour la charge en résultant, et que l'autre voisin ne peut prétendre qu'en agissant ainsi, il s'est illégalement emparé de ce mur—Q. B.—*Peachy & O'Neil*, 13 R. L., p. 45.

516. If the common wall be not in a condition to support the superstructure, he who wishes to raise it must have it rebuilt at his own cost, and the excess of thickness must be taken on his own side. —Paris, 195; Desgodets p. 174; 2 Laurière, 173; Pothier, *Société*, nn. 212, 215, 250, 252; 2 Marcadé, p. 580; 5 Pand. Franç., 419; C. N., 659. [I. 487.]

DECISIONS:—1. No damages can be recovered on account of inconvenience and loss suffered by the taking down and rebuilding of a *mitoyen* wall, when such inconvenience and loss are the necessary consequence of the taking down and rebuilding of the wall, and when all proper precautions have been observed and no unnecessary delay or neglect has taken place. Although the *mitoyen* wall may be sufficient for the existing buildings, yet, if it be insufficient to support a new edifice which one of the two neighbouring proprietors wishes to build, the party so wishing to build has a right to demolish such *mitoyen* wall and rebuild the same, on observing the formalities in that behalf by law required.—Q. B.—*Lyman & Peck*, 6 L. C. J., p. 214.

2. Plaintiff sued for damages for loss and inconvenience caused by the taking down and rebuilding of a *mitoyen* wall. It being proved that no unnecessary delay or neglect had taken place, the action was dismissed.—C. R.—*Chaussé vs Lareau*. 4 L. N., p. 351.

517. The neighbour who has not contributed to the superstructure may acquire the joint-ownership of it, by paying half of the cost thereof, and the value of one half of the ground used for the excess of thickness, if there be any.—Paris, 195; Orléans, 237; Pothier, *Société*, 217, 252; 5 Pand. Franç., p. 419; 2 Maleville, 99; 2 Marcadé, 580; C. N., 660. [I. 487 to 489.]

518. Every owner of property adjoining a wall, has the privilege of making it common in whole or in part, by paying to the proprietor of the wall half the value of the part he wishes to render common,

Digitized by Google

and half the value of the ground on which such wall is built.—Paris, 194 ; Pothier, *Société*, 247, 248, 250, 251, 254 ; *Cout.*, d'Orl., tit. 13, art. 235, 237 ; Merlin, vo. *Vue*, § 3, n. 8 ; 5 Pand. Franç., pp. 420-1 ; 2 Marcadé, 581. C. N., 661. [I. 489.]

DECISIONS :—1. An owner of property adjoining a wall cannot make it common unless he first pays to the proprietor of the wall half the value of the part he wishes to render common, and half the value of the ground on which such wall is built. Demolition of works completed may properly be demanded in a petitory action for the recovery of property and the present action is one in the nature of a petitory action.—SUPREME COURT.—*Joyce & Hart*, 1 S. C. R., p. 321.

2. La facultée accordée par l'article 661 C. N., à tout propriétaire joignant un mur de le rendre mitoyen, doit être strictement limitée dans son exercice au cas expressément prévu par cet article, c'est-à-dire, au cas où l'héritage du propriétaire qui prétend user de cette faculté, atteint directement au mur qu'il entend ainsi rendre mitoyen. Cette faculté n'a pas lieu dès lors qu'il existe entre le mur et cet héritage un espace de terrain, quelque minime qu'il soit, et sans qu'il puisse y avoir lieu d'avoir égard à l'utilité plus ou moins grande que le propriétaire du mur peut tirer de ce terrain.—COUR D'APPEL DE BORDEAUX.—*Sieuzac vs Cottineau*, 11 L. N., p. 141.

519. One neighbour cannot make any recess in the body of a common wall, nor can he apply or rest any work there, without the consent of the other, or on his refusal, without having caused to be settled by experts the necessary means to prevent the new work from being injurious to the rights of the other. — Paris, 199, 203 ; Orléans, 231 ; Pothier, *Société*, n. 218 ; Desgodets, 218 ; 5 Pand. Franç., 422 et seq. ; 2 Malevile, 99, 100-1 ; C. N., 662. [I. 489.]

DECISIONS :—Le voisin qui construira sur un mur non mitoyen, appartenant à son voisin, sera tenu de démolir la bâtisse qu'il aura érigée sur ce mur, à moins que, dans un délai fixé par la cour, il ne prenne les moyens de rendre ce mur mitoyen, et dans tous les cas, il sera condamné à des dommages envers le propriétaire du mur.—Q. B.—*Hart & Joyce*, 8 R. L., p. 209.

2. When a person made a hole in a *mitoyen* wall, without permission of his neighbour or taking the legal alternative procedure, he was ordered to restore the wall to its original condition.—Q. B.—*Stephen & Walker*, 6 L. N., p. 286.

520. Every person may oblige his neighbour, in incorporated cities and towns, to contribute to the building and repair of the fence-wall separating their houses, yards and gardens situated in the said cities and towns, to a height of ten feet from the ground or the level of the street, including the coping, and to a thickness of eighteen inches, each of the neighbours being obliged to furnish nine inches of ground ; saving that he for whom such thickness is not sufficient may add to it at his own cost and on his own land.—Paris, 209 ; Orléans,

Digitized by Google

236 ; *ff* L. 35, L. 36, L. 37, L. 39, *De damno infecto* ; Pothier, *Société*, 192, 223, 234 ; *Cout. d'Orl.*, tit. 13, art. 236 ; Desgodets, pp. 209, 236 ; 5 Pand. Franç., p. 432 ; 2 Maleville, 101-2 ; Perrault, *Extraits de la Prévosté, Québec*, p. 73 ; *Ibid., Extraits, Conseil Sup.*, p. 33 ; C. N., 663. [I. 489.]

DECISIONS :—1. Avant le code, le propriétaire qui voulait bâtir dans la ligne séparant son héritage de celui du voisin avait le droit de prendre la moitié de l'épaisseur de son mur sur le terrain voisin, pourvu que l'épaisseur totale du mur n'excédât pas dix-huit pouces, et cela lors même qu'il existait déjà une clôture en bois séparant les deux héritages.—Q. B.—*Prévost & Perrault*, 13 L. C. J., p. 106.

2. Le droit de forcer un voisin à contribuer au mur mitoyen, jusqu'à l'héberge, c'est-à-dire dix pieds de terre, et de fournir neuf pouces de terrain à cet effet, est absolu et non pas soumis à la condition de nécessité, ni restreint par les inconvénients qui peuvent en résulter au voisin.—Q. B.—*Prévost & Perrault*, 2 R. L., p. 109.

3. In this case it was a question whether the wall was *mitoyen* or not. The wall was not perpendicular and although built on one neighbour's land, yet it leaned over the other's land. It was held not to be *mitoyen*.—Q. B.—*Quinn & Leduc*, 6 L. N., p. 287.

4. Que chacun peut contraindre son voisin dans les cités et villes incorporées à contribuer à la construction et réparation des murs de clôture faisant séparation de leurs maisons, cours et jardins, et que les murs de clôtures comprennent les murs qui séparent les logements. Que le voisin qui veut ainsi construire un mur de clôture faisant séparation de sa bâtisse d'avec celle de son voisin, n'est pas tenu à d'autre formalité qu'à une simple notification. Que celui qui pour construire un mur de division d'entre son héritage et celui de son voisin, est obligé de démolir le pignon des bâtisses du voisin, doit remettre les lieux dans le même état qu'ils étaient avant qu'il eut commencé à construire son mur. et qu'il est responsable des dommages qu'il cause au voisin.—Mathieu, J.—*Massé vs Leclerc*, 12 R. L., p. 557.

5. La preuve testimoniale est inadmissible pour établir le consentement du voisin à l'érection et au placement d'un mur mitoyen. (See C. C. 510).—Sicotte, J.—*Leduc vs McShane*, 29 L. C. J., p. 56.

521. [When the different stories of a house belong to different proprietors, if their titles do not regulate the mode of repairing and rebuilding, it must be done as follows :

All the proprietors contribute to the main walls and the roof, each in proportion to the value of the story which belongs to him ;

The proprietor of each story makes the floor under him ;

The proprietor of the first story makes the stairs which lead to it ; the proprietor of the second story makes the stairs which lead from the first to his, and so on.]—Orléans, 257 ; Lamoignon, tit. 20, art. 32 ; 2 Bousquet, p. 146 ; 7 Locré, pp. 442 443 ; 2 Pand. Franç., 436 ; C. N., 664. [I. 489.]

Digitized by Google

522. When a common wall or a house is rebuilt, the active and passive servitudes continue with regard to the new wall or to the new house, provided they are not rendered more onerous, and provided the rebuilding be done before prescription is acquired.—5 Pand. Franç., p. 440 ; 7 Locré, p. 444 ; C. N., 665. [I. 489.]

523. All ditches between neighbouring properties are presumed to be common if there be no title nor mark to the contrary.—Pothier, *Société*, 224 ; 3 Toullier, p. 154 ; 7 Locré, p. 445 ; 1 Maleville, 104 ; 2 Marcadé, 585 ; C. N., 666. [I. 489.]

524. When the embankment or the earth thrown out of a ditch is only on one side of it, it is a mark that the ditch is not common.—Pothier, *Société*, 224 : 2 Bousquet, p. 149 ; 5 Pand. Franç., 442 ; C. N., 667. [I. 489.]

525. A ditch is presumed to belong exclusively to him on whose side the earth is thrown out.—Pothier, *Société*, 224 ; 3 Toullier, p. 154 ; C. N., 668. [I. 491.]

526. A common ditch must be kept at common expense.—Pothier, *Société*, 226 ; Desgodets, pp. 399 et seq. ; 5 Pand. Franç., 442 et seq. ; 7 Locré, 447 ; 2 Maleville, 104 ; 2 Marcadé, 585 ; C. N., 669. [I. 491.]

527. Every hedge which separates land is reputed to be common, unless only one of the lands is inclosed, or there is a sufficient title or possession to the contrary.—2 Coquille, *Quest.* 298 ; 2 Marcadé, pp. 585 et seq. ; Pothier, *Société*, nn. 225-6 ; Lamoignon, tit. 20, art. 40 ; Desgodets, p. 384 ; Merlin, vo. *Haie*, n. 3 ; 3 Toullier, pp. 154-5-6. 7 Locré, 445 ; 1 Lepage, 219 ; C. N., 670. [I. 491.]

528. No neighbour can plant trees or shrubs or allow any to grow nearer to the line of separation than the distance prescribed by special regulations, or by established and recognized usage ; and in default of such regulations and usage, such distance must be determined according to the nature of the trees and their situation, so as not to injure the neighbour.—*ff* L. 13, *Fin regund* ; Desgodets, p. 386, note (1) ; 1 Guyot, Rép., vo. *Arbres*, 561 ; Lamoignon, tit. 20, art. 41 ; Pothier, *Société*, n. 242 ; *Cout. d'Orl.*, tit. 13, art. 259 ; 1 Fournel, pp. 134-7-8-9, 141 ; N. Deniz.. vo. *Arbres*, pp. 247-8 ; 1 Lepage, 224-5 ; 2

Digitized by Google

Bousquet, 150; 5 Pand. Franç., 449 et seq.; 7 Locré, 449 et seq.; Perrin, *Code des Constructions*, nn. 771 et seq.; 1 Sebire et Carteret vo. *Arbres*, p. 3; 2 Maleville, 104-5; 2 Marcadé, p. 590; C. N., 671. [I. 491.]

DECISIONS:—1. Le propriétaire d'arbres forestiers croissant sur sa propriété, en existence depuis plus de trente ans et avoisinant son copropriétaire, doit être maintenu dans la possession de ces arbres dans l'état dans lequel ils sont.—BERTHELOT, J.—*Ferguson vs Joseph*, 10 L. C. J.. p. 333.

2. *L'échenillage* n'est pas obligatoire en ce pays. La prescription trentenaire s'applique aux arbres plantés sur l'héritage voisin près de la clôture de division. *Secus* des branches et racines de ces arbres.—Q. B.—*Ferguson & Joseph*, 12 L. C. J., p. 72.

529. Either neighbour may require that any trees and hedges which contravene the preceding article be uprooted.

He over whose property the branches of his neighbour's trees extend, although the trees are growing at the prescribed distance, may compel his neighbour to cut such branches.

If the roots extend upon his property, he has a right to cut them himself.—*ff* L. 1, §§ 1, 6, 7, *de arbor. cœdendis;* Coquille, *quest.* 274; Basnage, sur art. 608, *Cout. de Norm.*; Fournel, 134 et seq.; Pothier, *Société*, n. 243; 5 Pand. Franç., pp. 453 et seq.; Merlin, vo. *Arbre*, n. 6; Maleville, 106; C. N., 672. [I. 491.]

530. Trees growing in a common hedge are common as the hedge itself, and either of the neighbours has a right to have them felled.—*ff* L. 13, *Fin. regund.*; L. 2, *de arbor. cœdendis*; Desgodets, 386; 1 Fournel, 149-154; Pothier, *Société*, n. 226; 1 Lepage, pp. 228, 231-2; 3 Toullier, p. 157; C. N., 673. [I. 491.]

531. Every proprietor or occupier of land in a state of cultivation, contiguous to uncleared land, may compel the proprietor or occupier of the latter to fell all trees along the line of separation which are of a nature to injure the cultivated land, and this on the whole length, and on the breadth, in the manner, and at the time determined by law, by regulations having force of law, or by established and recognized usage.

Trees, however, which may be preserved on or near the line, with or without curtailing the branches or roots, according to the three last preceding articles, are excepted.

Fruit trees and maple trees, which may be preserved in all cases near or along the line, but are subject to the same curtailing, are also excepted.

Digitized by Google

The fine for any contravention does not free one from the necessity of giving the clearance ordered by a competent tribunal, nor from the damages actually incurred since the party was put in default.—C. S. L. C., c. 26, s. 17. [I. 491.]

SECTION II. — OF THE DISTANCE AND THE INTERMEDIATE WORKS REQUIRED FOR CERTAIN STRUCTURES.

532. The following provisions are established for incorporated cities and towns:

1. He who wishes to have a well near the common wall or that belonging to his neighbour, must make a counter-wall of masonry one foot thick;

2. He who wishes to have a privy near such walls must make a counter-wall of the same kind [fifteen inches] thick;

If however there be a well opposite, on the neighbouring property, the thickness must be [twenty-one inches;]

3. [When the well or privy is at the distance from the wall determined by municipal regulations and by established and recognized usage, such counter-wall is no longer required. If there be no such regulations or usage the distance is three feet;]

4. He who wishes to have a chimney, or a hearth, or a stable, or a store for salt or other corrosive substances, near a common wall or wall belonging to his neighbour, or to raise the ground or heap earth against it, is obliged to make a counter-wall or other work, the sufficiency of which is [determined by municipal regulations, by established and recognized usage, and, in default of any such, by the courts in each case;]

5. He who wishes to have an oven, forge or furnace, must leave a vacant space of six inches between his own wall and the common wall or that of his neighbour. — Paris, 118-122, 188-192; C. N., 674. [I. 493.]

DECISION;—The Defendant had built privies against the *mur mitoyen* of the Plaintiff, his neighbour, and the filth from these places had penetrated and flowed through the *mur mitoyen*, causing a disagreable smell in the Plaintiff's premises. The Defendant was condemned to pay £50 as damages and also ordered to thoroughly repair the *mur mitoyen*.—Q.B.—*Beaudry & Roy*, 2 L. C. L. J., p. 20.

SECTION III.—OF VIEW ON THE PROPERTY OF A NEIGHBOUR.

533. One neighbour cannot, without the consent of the other, make in a common wall any window or opening of any kind what-

Digitized by Google

ever, not even those with fixed glass.—*ff* L. 10, *De servit præd. urb.*; L. 28, *Communi divid.*; *Cod.*, L. 8, *De servitut. et aquâ*; Paris, 199; Pothier, *Société*, nn. 217, 240; Lamoignon, tit. 20, art. 22; Desgodets, pp. 218-224; Orléans, 231; Merlin, Rép., vo. *Vue*, § 3, n. 9: 2 Pand. Franç., pp. 467-8; 7 Locré, p. 455; C. N., 675. [I. 495.]

534. The proprietor of a wall which is not common adjoining the land of another, may make in such wall lights or windows with iron gratings and fixed glass, that is to say, such windows must be provided with an iron trellis the bars of which are not more than four inches apart, and a window-sash fastened with plaster or otherwise in such a way that it must remain closed. —*ff* L. 2, *De servit. præd. urb.*; L. 26, *De damno infecto*; Paris, 200, 201; Orléans, 229; Lamoignon, tit. 20, art. 23; Merlin, Rép., vo. *Vue*, § 3, n. 9; Desgodets, pp. 225, 247; 2 Laurière, p. 175: 2 Maleville, 109 et seq.; Pand. Franç., 470 et seq.; C. N., 676. [I. 495.]

535. Such windows or lights cannot be placed lower than nine feet above the floor or ground of the room it is intended to light, if it be on the ground floor; nor lower than seven feet from the floor, if in the upper stories.—Paris, 200; 2 Laurière, p. 175; Desgodets, pp. 225-242; 7 Locré, p. 464; C. N., 677. [I. 495.]

536. One neighbour cannot have direct views or prospect-windows, nor galleries, balconies or other like projections overlooking the fenced or unfenced land of the other; they must be at a distance of six feet from such land.—Paris, 202; Pothier, *Cout. d'Orl.*, tit. 13, note 2, art. 231; Desgodets, pp. 247-259; 2 Laurière, 176; Lamoignon, tit. 20, art. 27; 2 Maleville, 110-1; 7 Locré, 467; C. N., 678. [I. 495.]

DECISION:—Qu'un propriétaire ne sera pas admis à se plaindre des vues ouvertes dans les bâtisses de son voisin, à la distance prohibée par la loi, si ses propres constructions empêchent ces vues de pénétrer chez lui.—C. R.—*Touchette vs Roy*, 3 Q. L. R., p. 260.

537. Nor can he have side openings or oblique views overlooking such land, unless they are at a distance of two feet.—Paris, 202, Desgodets, pp. 247 et seq.; C. N., 679. [I. 495.]

538. The distances mentioned in the two preceding articles are reckoned from the exterior facing of the wall where the opening is made, and if there be a balcony or other like projection, from the

Digitized by Google

exterior line thereof.—Desgodets, pp. 247 et seq.; Merlin, vo. *Vue*, § 1, n. 7; 2 Bousquet, 157; 5 Pand. Franç., p. 174; C. N., 680. [I. 495.]

SECTION IV.—OF THE EAVES OF ROOFS.

539. Roofs must be constructed in such a manner that the rain and snow from off them may fall upon the land of the proprietor without his having a right to make it fall upon the land of his neighbour.—Pothier, *Société*, n. 240; Desgodets, pp. 49 et seq.; Lamoignon, tit. 20, art. 6; Pocquet, *Des servit.*, liv. 2, tit. 4, art. 26; 2 Toullier, p. 211; 7 Locré, p. 473; 5 Pand. Franç., p. 475; 2 Maleville, 111; C. N., 681. [I. 497.]

DECISION:—Le propriétaire de l'héritage est tenu du dommage causé par la pluie et la neige qui tombent du toit de ses bâtiments sur l'héritage du voisin.—Q. B.—*Victoria Skating Rink & Beaudry*, 2 R. C., p. 231.

SECTION V.—OF THE RIGHT OF WAY.

540. A proprietor whose land is enclosed on all sides by that of others, and who has no communication with the public road, may claim a way upon that of his neighbours for the use of his property, subject to an indemnity proportionate to the damage he may cause.—Pothier, *Vente*, nn. 514, 515, *Société*, 246, *Douaire*, 210; Lamoignon, tit. 20, art. 21; 2 Maleville, p. 112; 5 Pand. Franç., p. 478; C. N., 682. [I. 497.]

DECISIONS:—1. Le droit de passage sur un héritage pour arriver à une enclave qui n'a pas d'autre voie d'accès, est une servitude légale dont il n'est pas nécessaire de produire un titre par écrit, lorsque la jouissance en a duré plus de trente ans.—Berthelot, J.—*Rauger vs Rauger*, 14 L. C. R., p. 134.

2. The road in question, which had been enjoyed as such for thirty years and upwards, by the plaintiff, the defendant and others requiring to use it, was to be deemed a public road, within the meaning of the Act 18 Vict., c. 100, s. 41, s. s. 7. As to whether the proprietor of a *fonds enclavé* (within the meaning of article 540 of the Civil Code), who has enjoyed a right of passage over an adjoining property for 30 years and upwards, is liable to be disturbed in his enjoyment, by reason merely of his being unable to produce a written title, as the basis of his enjoyment. Does the maxim "nulle servitude sans titre," apply to a case such as the present?—C. R.—*Parent vs Daigle*, 4 Q. L. R., p. 154.

3. The right of passage in favor of an *enclavé* is based upon necessity, not convenience, and ceases *de plano* with the necessity, where no indemnity has been paid.—Q. B.—*Sundberg & Wilder*, 29 L. C. J., p. 216; 7 L. N., p. 168.

4. Que sans prononcer sur le droit de l'enclave dans ce cas-ci, ce droit aurait peut-être pu être invoqué, à défaut de deux autres points, mais que, néanmoins, l'appelant ayant un simple droit de passage, n'a pas le droit d'y pratiquer des trappes ni d'encombrer le passage.—Q. B.—*Têtu & Gibb*, 5 Q. L. R., p. 172.

Digitized by Google

5. Que la servitude du passage en cas d'enclave ne fait pas exception à la maxime *nulle servitude sans titre* et ne peut pas s'acquérir par prescription. Que si le propriétaire d'un fonds enclavé n'a pas exigé en justice ou obtenu par titre le droit du passage, l'usage qu'il a fait d'un chemin de passage chez son voisin est réputé précaire, de tolérance, et ne peut créer aucun droit. Que si l'enclave n'existe que par le fait des auteurs du propriétaire enclavé, le passage doit être pris par préférence sur la propriété détachée par leur acte de l'immeuble maintenant enclavé, à moins que ce passage ne nécessite des dépenses hors de proportion avec la valeur du dit immeuble.—TASCHEREAU, J.—*Roy vs Beaulieu*, 9 Q. L. R., p. 97.

6. Que pour qu'un terrain soit considéré enclavé dans le sens de 540 C. C., il faut qu'il n'ait aucune issue quelconque sur la voie publique, et qu'un simple chemin de tolérance non contesté est suffisant pour empêcher le propriétaire du terrain de réclamer un passage de ses voisins.—C. R.—*Mainville vs Legault*, M. L. R., 1 S. C., p. 295.

7. En admettant qu'une rivière puisse être regardée comme une voie publique, l'issue qu'elle offre au fonds qu'elle confine et qui est entouré de tous les autres côtés par d'autres propriétés, est insuffisante, et il y a en pareil cas, enclave.—*Tribunal Civil de la Seine, Présidence de M. Mercier*, 13 R. L., p. 366.

541. The way must generally be had on the side where the crossing is shortest from the land so enclosed to the public road.—Pothier, *Vente*, 514, 515; Lamoignon, tit. 20, art. 21; 2 Maleville, p. 113; C. N., 683. [I. 497.]

542. It should however be established over the part where it will be least injurious to him upon whose land it is granted.—Domat, *Servitudes*, tit. 12, s. 3, n. 2, p. 334; 2 Maleville, 114; 7 Locré, 476-500; C. N., 684. [I. 497.]

543. If the land become so enclosed in consequence of a sale, of a partition, or of a will, it is the vendor, the copartitioner, or the heir, and not the proprietor of the land which offers the shortest crossing, who is bound to furnish the way, which is in such case due, without indemnity.—*ff* L. 22, *De condict. indeb;* L. 1, §§ 2, 3, *Si ususfructus petitur;* Graverol sur Laroche, *Lettre S*, liv. 3, tit. 4; Coquille, *sur les Cout., Quest.*, 74, pp. 214 et seq.; Lapeyrère, *Lettre S*, n. 39; 2 Fournel, *Voisinage*, pp. 404 et seq.; 2 Maleville, p. 130; 5 Pand. Franç., 478; 1 Pardessus, *Servitudes*, pp. 495-8; Code Sarde, 619; C. L., 697, 698. [I. 497.]

544. If the way thus granted cease to be necessary, it may be suppressed, and in such case the indemnity paid is restored, or the annuity agreed upon ceases for the future.—1 Pardessus, *Servitudes*, pp. 502-3; Code Sarde, 620; Canton de Vaud, 475. [I. 497.]

Digitized by Google

CHAPTER THIRD.

OF SERVITUDES ESTABLISHED BY THE ACT OF MAN.

SECTION I.—OF THE DIFFERENT KINDS OF SERVITUDES WHICH MAY BE ESTABLISHED ON PROPERTY.

545. Every proprietor having the use of his rights, and being competent to dispose of his immoveables, may establish over or in favor of such immoveables, such servitudes as he may think proper, provided they are in no way contrary to public order.

The use and the extent of these servitudes are determined according to the title which constitutes them, or according to the following rules if the title be silent.—*ff* L. 1, L. 6, L. 16, *Communia præd.*; L. 5, *De servitut.*; L. 19, *De usufructu et quemadmodum*; Pothier, *Intr. au tit.* 13, *Cout. d'Orl.*, nn. 5, 6, 9, 10; 3 Toullier, pp. 62, 241-246, 426, 446; 5 Pand. Franç., pp. 484 et seq.; 1 Domat, *Servitudes*, sec. 1, nn. 3, 14; 2 Maleville, pp. 131-3; 7 Locré, 507 et seq.; 2 Bousquet, 162 et seq.; C. N., 686. [I. 497 to 499.]

Amendments:—5. In default of the enregistration of the deed creating the same, no real, discontinuous and unapparent servitude, hereafter created and constituted by title, shall have any effect as regards third parties who shall have become proprietors or creditors subsequent to the passing of this act, and whose rights have been or shall have been enregistered.

6. A delay of two years, dating from the coming into force of this act, is granted to the parties interested, for enregistering the servitudes above-mentioned, created before the coming into force of this act, after which delay, if they be not enregistered, such servitudes shall be inoperative as regards third parties who may, subsequently, become proprietors or creditors, and whose rights have been or shall have been enregistered.

7. Within two years after the coming into force of this act, in registration divisions in which the cadastre is now in force, within two years next after the coming into force of the cadastre, in the other registration divisions, the enregistration of any conventional servitude affecting any lot of land included in such registration division must be renewed by means of a transcription in the books kept for that purpose, of a notice describing the immoveable affected in

Digitized by Google

the manner prescribed by article 2168, and by observing the formalities required by article 2131 of the Civil Code.—Q. 44-45 Vict., c. 16, ss. 5 to 7.

The act 44-45 Vict., chap. 16, is amended in such manner that the delay of two years, mentioned therein, for effecting the registration of customary dowers, created before the first of August, one thousand eight hundred and sixty-six, as well as real, conventional, discontinuous and unapparent servitudes, created before the coming into force of the said statute, shall be extended to the first day of May, one thousand eight hundred and eighty-four.—Q. 46 Vict., cap. 25, s. 1.

1. The act 44-45 Victoria, chapter 16, as amended by the act 46 Victoria, chapter 25, is amended in such manner that a further delay for effecting the registration of customary dowers, created before the first of August, one thousand eight hundred and sixty-six, as well as of real, conventional, discontinuous and unapparent servitudes, created before the coming into force of the said act 44-45 Victoria, chapter 16, shall be granted to the first day of January, one thousand eight hundred and eighty-five.

2. The said delay expired, such unregistered customary dowers and servitudes shall be null and become extinguished for all purposes whatsoever, as regards purchasers and hypothecary creditors.

3. This act shall not effect rights acquired, in virtue of the said act 44-45 Victoria, chapter 16, by third parties and creditors as against such dowers and servitudes.—Q. 47 Vict., cap. 15, ss. 1 to 3.

DECISIONS :—1. The defendant, by the making of a drain or trench, having changed the course of a rivulet or stream flowing through his property so as to cause it to pass through the land of the plaintiff, where it had never passed before, it was held that such diversion of the water constituted an illegal servitude on the plaintiff's property.—MEREDITH, C. J.—*Maguire vs Donovan*, 10 Q. L. R., p. 267.

2. When in a partition between proprietors *par indivis* of a seignory, it was stipulated that no *moulin à farine* should be erected by either of the parties *dans les limites d'une lieue des moulins à farine existants alors* and the property passed through several hands and was sold at Sheriff's sale, and the last proprietor built a mill thereon. *Held* :—That there was no real servitude, and that the stipulation was annulled by the Seignorial Act, 1854, abolishing *droit de banalité*. Q. B.—*Mondelet & Roy*, 4 Q. B. R., p. 7, M. L. R., 1 Q. B., p. 9.

3. By an unregistered deed of sale, A. sold a lot of land, now possessed by Appellant, reserving a right of passage in common on the land sold, in favour of the remainder of his property now possessed by respondent.—*Held* :—That the right of way in favour of respondent was not extinguished by the fact of non-registration of the said deed of sale, inasmuch as appellant and

Digitized by Google

his *auteurs* had purchased subject to the servitude mentioned in the original deed. Q. B.—*Dunn & Wiggins*, 4 Q. B. R., p. 89.

4. That the renewal of registration of any real right required by C. C. 2172, has no reference to a right in the property itself, such as a servitude of drain through a property, established by deed in favour of a neighbouring property. Where the proprietor of the servient land built a barn over the drain and the repairing of the drain became imperative, it was held that the person to whom the servitude was due was entitled to have the barn demolished so far as the repairing of the drain necessitated that course.—Q. B.—*Wheeler & Black*, M L. R., 2 Q. B. p. 139.—Confirmed in Supreme Court, 10 L. N., p. 107, 14 S. C. R. p. 242.

See also cases noted at 500 to 503 C. C.

546. Real servitudes are established either for the use of buildings or for that of lands.

Those of the former kind are called urban, whether the buildings to which they are due are situated in town or in the country.

Those of the second kind are called rural without regard to their situation.

Servitudes take their name from the property to which they are due, independently of the one which owes them.—*ff* L. 1, L. 2, *De servit præd. rust;* L. 198, *De verb. signif.;* Pothier, *Intr. au tit.* 13, *Cout. d'Orl.*, nn. 2, 3, 4; 2 Du Parc Poullain, 294; 2 Maleville, pp. 116 et seq.; 7 Locré, 515 et seq.; 3 Toullier, p. 341; 2 Bousquet, 164; 5 Pand. Franç., pp. 345 et seq., 485, 486; C. N., 687. [I. 499.]

547. Servitudes are either continuous or discontinuous.

Continuous servitudes are those the exercise of which may be continued without the actual intervention of man; such are water conduits, drains, rights of view and others similar.

Discontinuous servitudes are those which require the actual intervention of man for their exercise; such are the rights of way, of drawing water, of pasture and others similar.—*ff* L. 14, *De servitut.*, L. 1, *De aquâ quotidianâ et æstivâ;* 3 Toullier, 413, 443; 2 Marcadé, 614; 5 Pand. Franç., 486-7; 2 Bousquet, 165; 1 Demante, 377; 2 Maleville, 120; 7 Locré, 515; C. N., 688. [I. 499.]

DECISIONS:—1. The undertaking of a party in a deed of partition to suffer a roadway upon his portion of land and to make and macadamize the same to the extent of thirty feet in width, is a servitude *et charge réelle* for the preservation of which the party in whose favour it is stipulated hath a right to make an opposition *afin de charge* upon a judicial sale of the property.—Q. B.—*Murray & Macpherson*, 5 L. C. R., p. 359.

2. Le droit de faire pacager des animaux sur une terre, créé en faveur du propriétaire d'un emplacement, est une servitude réelle.—Q. B.—*Dorion & Rivet*, 7 L. C. R., p. 257.

Digitized by Google

548. Servitudes are apparent or unapparent.

Apparent servitudes are those which are manifest by external signs, such as a door, a window, an aqueduct, a sewer or drain, and the like.

Unapparent servitudes are those which have no external sign, as for instance, the prohibition to build on a land or to build above a certain fixed height.—*ff* L. 20, *De servitut. præd. urb.;* 3 Toullier, p. 443 ; 1 Demante, 377 ; 7 Locré, pp. 512-3 ; 5 Pand. Franç., 487 ; 2 Maleville, 115-121 ; 2 Marcadé, 614 ; C. N., 689. [I. 499.]

SECTION II.—HOW SERVITUDES ARE ESTABLISHED.

549. No servitude can be established without a title ; possession even immemorial is insufficient for that purpose.—Paris, 186 ; Pothier, *Intr. au titre* 13, *Cout. d'Orl.*, n. 10 ; *Cout. d'Orl.*, tit. 13, art. 225 ; *Prescription*, nn. 164, 286, 287 ; 2 Maleville, p. 122 ; C. N., 690-691. [I. 499.]

DECISIONS:—1. La possession à titre civil d'un héritage en faveur duquel il existe une servitude est un titre suffisant pour jouir de cette servitude.—LORANGER, J.—*Monastesse vs Christie*, 8 L. C. J., p. 154.

2. Pour exercer l'action possessoire dans la jouissance d'une servitude, le demandeur est tenu de faire apparaître du titre de cette servitude.—C. R.—*Cross vs Judah*, 15 L. C. J., p. 264.

3. Quiconque est troublé dans la possession d'une servitude dont il a jouit pendant un an et un jour, ne peut intenter l'action possessoire sans alléguer et produire son titre ; car pas de servitude sans titre.—Quand le droit de servitude est douteux en vertu du titre, le doute doit être donné en faveur de l'immeuble servant.—C. R.—*Cross vs Judah*, 1 R. C., p. 242.

4. Where a passage way has been opened and used from time immemorial, no title of servitude is requisite to support an action *confessoria* for encroachments on the same.—C. R.—*Théoret vs Ouimet*, 4 Q. L. R., p. 250.

5. A servitude cannot be created by *destination de père de famille*, unless such *destination* is in writing.—Q. B.—*Fisher & Evans*, M. L. R., 1 Q. B., p. 415, 29 L. C. J., p. 258.

6. That possession, although it may be equivalent to registration to prevent the acquisition of a servitude, is not equivalent to registration, as regards the acquisition of a servitude.—MEREDITH, C. J.—*Stringer vs Crawford*, 5 Q. L. R., p. 89.

7. Que les faits de jouissance ne suffisent pas seuls, pour établir une servitude de passage, mais qu'ils servent à expliquer les réserves des droits de servitude et de passage contenus aux titres, et l'intention des parties à ces titres.—Q. B.—*Têtu & Gibb*, 10 R. L., p. 483, 5 Q. L. R., p. 172.

8. Que la servitude du passage en cas d'enclave ne fait pas exception à la maxime "*nulle servitude sans titre*" et ne peut pas s'acquérir sans titre.—TASCHEREAU, J.—*Roy vs Beaulieu*, 9 Q. L. R., p. 97.

9. Usage for thirty years even does not constitute a right to a servitude. See case noted at C. C. 503.—ANGERS, J.—*Bélanger vs Dupont*, 13 Q. L. R., p. 115.

Digitized by Google

10. A road, enjoyed as such by the Plaintiff, the Defendant and others requiring it, is to be deemed a public road. *Quære.* Does the maxim "*nulle servitude sans titre*" apply to a case such as the present.—C. R.—*Parent vs Daigle*, 4 Q. L. R., p. 154.

550. The want of a title creating the servitude can only be supplied by an act of recognition proceeding from the proprietor of the land subject thereto.—3 Toullier, pp. 446-7; 2 Bousquet, 170; 2 Maleville, 127; 5 Pand. Franç., 491-2; C. N., 695. [I. 499.]

DECISION:—En matière de servitude le titre constitutif doit être interprété strictement, et le titre recognitif ne peut effectivement relater que la teneur du titre constitutif.—BERTHELOT, J.—*Soriole vs Potvin*, 2 R. L., p. 570.

551. As regards servitudes the destination made by the proprietor is equivalent to a title, but only when it is in writing, and the nature, the extent and the situation of the servitude are specified.—*ff* L. 7, *Comm. præd*; Paris, 215, 216; Serres, *Inst.*, p. 145; Bourjon, *Servitudes*, sec. 3; Pothier, *Cout. d'Orl.*, tit. 13, art. 228 & notes; Lalaure, *Servitudes*, p. 170; 3 Toullier, 449, 451, 466, 476; C. N., 692, 693. [I. 499 to 501.]

DECISIONS:—Cette servitude étant de sa nature réelle et ayant été créée avant la passation des lois d'enregistrement peut subsister quoique l'acte qui l'a constituée n'ait pas été enregistré.—Q. B.—*Dorion & Rivet*, 7 L. C. R., p. 257.

See also the cases of *Fisher & Evans*, and of *Têtu & Gibb*, noted at C. C. 549, nn. 5 & 7.

552. He who establishes a servitude is presumed to grant all that is necessary for its exercise.

Thus the right of drawing water from the well of another carries with it the right of way.—*ff* L. 11, *Comm. Præd.*; L. 10, *De reg. juris*; 2 Maleville, p. 127; 5 Pand. Franç., 494; C. N., 696. [I. 501.]

SECTION III.—OF THE RIGHTS OF THE PROPRIETOR OF THE LAND TO WHICH THE SERVITUDE IS DUE.

553. He to whom a servitude is due has the right of making all the works necessary for its exercise and its preservation.—*ff* L. 20, § 1, *De servit. præd. urb*; L. 10, *De servitutibus*; L. 15, *De servitut. præd. rust*; L. 11, *Comm. præd*; Domat, liv. 1, tit. 12, sect. 1, n. 7, sect. 4, nn. 1, 2, sect, 5, n. 3; Lalaure, pp. 60, 74, 300; 3 Toullier, pp. 240, 241, 500; 7 Locré, p. 535; 5 Pand. Franç., 499; 2 Maleville, 128; C. N., 697. [I. 501.]

554. These works are made at his cost and not at that of the proprietor of the servient land, unless the title constituting the

Digitized by Google

servitude establishes the contrary.—*ff* L. 15, *De servitutibus*; L. 6, § 2, *Si servit. vindic*; Domat, *loc. cit.*; 1 Maleville, p. 128; 5 Pand. Franç., pp. 499 et seq.; C. N., 698. [I. 501.]

555. Even in the case where the proprietor of the servient land, is charged by the title with making the necessary works, for the exercise and for the preservation of the servitude, he may always free himself from the charge by abandoning the servient immoveable, to the proprietor of the land to which the servitude is due.—*ff.* L. 23, § 2, *De servit. præd. rust.*; L. 12, *Comm. præd.*; *Cod.*, L. 3, *De servitut. et aquâ*; 1 Domat, *Servitudes*, s. 4, n. 6; Favard, *vis Déguerpissement, Servitudes*; 3 Toullier, pp. 150, 217, 220, 224, 226, 501, 510, 511; 2 Maleville, 129; 7 Locré, 537 et seq.; C. N., 699. [I. 501.]

556. If the land in favor of which a servitude has been established come to be divided, the servitude remains due for each portion, without however the condition of the servient land being rendered worse.

Thus in the case of a right of way, all the co-proprietors have a right to exercise it, but they are obliged to do so over the same portion of ground.—*ff.* L. 17, *De servitutibus*; L. 23, *De servit. præd. rust*; Domat, *Des servitudes*, s. 4, n. 7; 3 Toullier, pp. 494-5; 2 Bousquet, 172; 7 Locré, 538-9; 2 Maleville, 130; 5 Pand. Franç., 502; C. N., 700. [I. 501.]

DECISIONS:—1. If a right of way is granted without any designation of its precise situation, over a lot held by two joint proprietors in common, and if by a *partage de fait*, the passage is located and used by both for a term of time, each party must abide by it, and an action of *partage* will not be maintained to effect a new location.—K. B.—*Duhamel vs Bélanger*, 1 R. de L., p. 505.

2. Le droit de faire pacager des animaux sur une terre, créé en faveur du propriétaire d'un emplacement, est une servitude réelle. La transmission de l'emplacement au moyen de dispositions testamentaires a eu l'effet de transporter comme accessoire cette servitude quoiqu'elle ne fût pas spécialement indiquée. Cette servitude étant de sa nature réelle et ayant été créée avant la passation des lois d'enregistrement, peut subsister nonobstant que l'acte qui l'a constituée n'ait pas été enregistré. Cette servitude peut être divisée, et l'héritage dominant se trouvant partagé, et moitié d'icelui étant échue au propriétaire de la servitude, la prestation peut être exigée pour moitié de celui qui est propriétaire de l'autre moitié de l'héritage servant; et dans l'espèce, la prestation devra se faire par ce dernier un an sur deux.—Q. B.—*Dorion & Rivet*, 7 L. C. R. p. 257, 1 L. C. J., p. 308.

557. The proprietor of the servient land can do nothing which tends to diminish the use of the servitude or to render its exercise more inconvenient.

Digitized by Google

Thus he cannot change the condition of the premises, nor transfer the exercise of the right to a place different from that on which it was originally assigned.

However if by keeping to the place originally assigned, the servitude should become more onerous to the proprietor of the servient land, or if such proprietor be prevented thereby from making advantageous improvements, he may offer to the proprietor of the land to which it is due another place as convenient for the exercise of his rights, and the latter cannot refuse it.—*ff* L. 9, *Si servit. vindic*; L. 20, § 3, L. 31, *De servit. præd. urb.*; *Cod.*. L. 5, § 9, *De servitut.*; Pothier, *Intr. au tit.* 13 *Cout. d'Orl.*, n. 7; *Société*, n. 212; 5 Pand. Franç., p. 503; 2 Maleville, 131; 2 Bousquet, 173; C. N., 701. [I. 501.]

DECISIONS:—1. Il n'y a pas lieu à l'action négatoire, quoique l'héritage en faveur duquel une servitude de coupe de bois a été créée, ait été agrandi, s'il n'appert que la servitude soit en conséquence devenue plus onéreuse.—Q. B.—*Blais & Simoneau*, 8 L. C. R., p. 356.

2. The proprietor of the servient land can do nothing which tends to render the service of the servitude less convenient than it was at the date of its creation; and so where the owner of the servient land constructed a barn over the drain running through his land and, in the opinion of the majority of the Court it was proved that repairs to the drain were necessary, it was held that the person to whom the servitude was due was entitled to ask that the barn be demolished to a sufficient extent to permit repairs to be made where necessary. The action to enforce such servitude does not lie against a person who has ceased to be the owner of the servient land before the action was instituted, but he may be condemned personally in damages, if he participated in the act of obstruction.—Q. B.—*Wheeler & Black*, M. L. R., 2 Q. B., p. 139.

Confirmed in Supreme Court, 10 L. N., p. 107, 14 S. C. R., p. 242.

558. On his part, he who has a right of servitude can only make use of it according to his title, without being able to make, either in the land which owes the servitude, or in that to which it is due, any change which aggravates the condition of the former.—*ff* L. 20, § 5, *De servit. præd. urb.*; L. 24, L. 29, *De servit. præd. rust*; L. 1, §§ 15, 16, *De aquâ quotid. et æstiv*; Domat, liv. 1, tit. 12, sec. 1, n. 8; Pothier, *Société*, nn. 236-7-9; 3 Toullier, pp. 490-2; 2 Maleville, p. 132; 2 Bousquet, 175; 2 Marcadé, 630; C. N., 702. [I. 503.]

DECISIONS:—1. L'obligation de fournir un chemin de communication à pied ou en voiture, ne donne pas le droit d'y passer avec des animaux. En matière de servitude le titre constitutif doit être interprêté strictement, et le titre recognitif ne peut effectivement relater que la teneur du titre constitutif.—Berthelot, J.—*Soriole vs Potvin*, 2 R. L., p. 570.

2. Qu'il y a aggravation d'une servitude de passage dans le fait du propriétaire du fonds dominant d'en changer l'exploitation et d'y élever des construc-

Digitized by Google

tions nouvelles attribuées à l'exercice d'industries non prévues par les p
lors de la construction de la servitude, qui ont l'effet d'aggraver la servitu
de la rendre plus onéreuse pour le fonds servant.—Q. B.—*McMillan &*
Abbattoir Co., 4 Q. B. R., p. 269, M. L. R., 1 Q. B., p. 376.

Confirmed by Supreme Court, 9 L. N., p. 410. (Not reported in the S.

3. Where the effect of a water course established by the *procès-verba*
municipality, was to aggravate greatly the servitude which the Plaintiff's
had to bear owing to its being lower than that of his neighbors, it was held
he was entitled to bring suit to have the *procès-verbal* set aside, although h
previously appealed to the County Council, who confirmed the *procès-verba*
B.—*Corp. de Par. de Ste. Anne du Bout de l'Ile & Reburn*, M. L. R., 1 Q. B., p

4. Qu'un propriétaire qui donne ou vend un droit de passage en ces te
" *auront le droit de s'en servir et d'en faire usage, soit en voiture ou autrem*
n'est pas pour cela empêché de bâtir au-dessus, pourvu qu'il laisse le passage
aéré et éclairé suffisamment pour permettre l'usage commode du dit passa
CIMON, J.—*Desjardins vs Cléroux*, M. L. R., 3 S. C., p. 45.

SECTION IV.—OF THE EXTINCTION OF SERVITUDES.

559. A servitude ceases when the things subject thereto a
such a condition that it can no longer be exercised.—Pothier, *
Cout d'Orl., tit. 13, n. 13; Domat, liv. 1, tit. 12, sec. 6; 2 Marcad
630; 5 Pand. Franç., 507; C. N., 703. [I. 503.]

DECISION:—L'extinction de la réserve d'une coupe de bois a lieu, lorsq
a été exercée une fois sur toute l'étendue du terrain réservé.—C. R.—*Crote*
Quintal, 1 L. C. J., p. 14.

560. It revives if the things be restored in such a manner
it may be used again, even after the time of prescription.—*ff* L. 3
35, *De servit. præd. rust*; L. 14, *Quemad. servit*, L. 19, *Si serv*
vindic; Domat, liv. 1, tit. 12, sec. 6, n. 1; 8 Proudhon, *Usufrui*
3698; 3 Toullier, pp. 522, 527, 531-2-3; 2 Bousquet, p. 174; 5 P
Franç., 507 et seq.; 2 Maleville, 133-4; C. N., 704. [I. 503.]

561. Every servitude is extinguished, when the land to whi
is due and that which owes it are united in the same person by r
of ownership.—*ff* L. 10, *Comm. præd.*; L. 30, *De servitut. præd.*
Domat, liv. 1, tit. 12, sec. 6; Pothier, *Intr.*, *tit.* 13, *Cout. d'Orl.*
14, 16; *Cout., d'Orl.*, art. 226; 3 Toullier, p. 503; 2 Maleville,
7 Locré, 547; 5 Pand. Franç., 509; 2 Bousquet, 175; C. N.,
[I. 503.]

562. Servitudes are extinguished by non-user during th
years, between persons of full age and not privileged. — Paris,

Digitized by Google

Domat, liv. 1, tit. 12, sec. 6, nn. 5-8 ; Pothier, *Intr. au titre* 13, *Cout. d'Orl.*, nn. 17, 18 ; *Cout. d'Orl.*, art. 226 ; Domat, *Servitudes*, sec. 1, n. 13 ; Serres, *Inst.*, p. 147 ; 2 Cochin, pp. 236-7 ; 3 Toullier, p. 524 ; Merlin, *Servitudes*, § 33, n. 11 ; C. N., 706. [I. 503.]

DECISION :—Dans la désignation suivante d'une servitude de coupe de bois donnée par un père à son fils, savoir, " la coupe de trois quarts d'arpent de bois de front sur la profondeur du bois à prendre sur la terre des donateurs, au dit lieu du quatrième rang de St-Denis," les caractères essentiels de la servitude, savoir : la nature, l'étendue et la situation, sont suffisamment spécifiées pour constituer la dite coupe, une servitude sur le fonds d'autrui. Une telle servitude est une servitude personnelle, mais n'en constitue pas moins une charge réelle grevant le fonds au profit du propriétaire de la servitude. Telle servitude ne constitue pas un simple engagement personnel de la part du donateur de fournir une coupe de bois au donataire, sujet à la prescription trentenaire des actions mobilières, mais constitue une charge réelle sur le fonds du donateur au profit du donataire. Une servitude de coupe de bois de cette espèce ne peut être prescrite par le laps de trente ans écoulés depuis la date de la donation qui la crée ; mais seulement par le non usage pendant trente ans. Dans l'espèce, la preuve démontrant que le demandeur a toujours exploité cette coupe annuellement depuis sa création par le dit acte de donation, qui a été duement enregistré, cette servitude n'est point prescrite, et le défendeur, tiers détenteur, ne peut prétendre en être libéré.—Sicotte, J.—*Archambault vs Archambault*, 15 L. C. J., p. 297.

563. The thirty years commence to run for discontinuous servitudes from the day on which they cease to be used, and for continuous servitudes from the day on which any act is done preventing their exercise.—Dunod, *Prescriptions*, 295 ; Domat, *Servitudes*, sec. 6, nn. 5, 8 ; Serres, p. 144 ; Lamoignon, tit. 20, art. 10 ; Pothier, *Intr. tit.* 13, *Cout. d'Orl.*, nn. 18, 19, 20 ; 2 Bousquet, p. 177 ; 5 Maleville, 135 ; 3 Toullier, 527 ; C. N., 707 ; C. L., 786. [I. 503.]

564. The manner of exercising a servitude may be prescribed like the servitude itself and in the same way.—*ff* L. 10, L. 14, L. 17, *Quemad. servitut. amitti*, 2 Malleville, p. 137 ; 5 Pand. Franç., 514 ; 3 Toullier, 486 ; C. N. 708 ; C. L., 792. [I. 503.]

565. If the land in favor of which the servitude is established belong to several persons by undivided shares, the enjoyment by one hinders the prescription with regard to the others.—*ff* L. 5., L. 10, L. 16, *Quemad. servitut. amitti ;* Domat, *Servitudes*, sec. 1, nn. 19, 20 ; 5 Pand. Fran., p. 514 ; 2 Maleville, 138-9 ; C. N., 709. [I. 503.]

566. If among the co-proprietors there be one against whom prescription cannot run, such as a minor, he preserves the right for

Digitized by Google

all the others.—*ff* L., 10, *Quemad. servit amitti*; Pothier, *Cout. d'Orl.*, art. 226, note 2; Domat, *Servitudes*, sec. 1, n. 21; Serres, pp. 145-6; 2 Bousquet, 178; 5 Pand. Franç., 515-6; 2 Maleville, 138: C. N., 710. [I. 505.]

TITLE FIFTH.

OF EMPHYTEUSIS.

SECTION I.—GENERAL PROVISIONS.

567. Emphyteusis or emphyteutic lease is a contract by which the proprietor of an immoveable conveys it for a time to another, the lessee subjecting himself to make improvements, to pay the lessor an annual rent, and to such other charges as may be agreed upon.—*Cod.*, L. 1, L. 2, L. 3, *De jure emphyt*; Domat, liv. 1, tit. 4, sec. 10, no 1; 6 Guyot. Rép., vo *Emphytéose*, p. 680; Anc. Deniz., vo *Emphytéose*, p. 296, no 1; 7 Nouv. Deniz., vo *Emphytéose*, p. 338; 2 Argou, p. 300; 1 Dict. de droit, p. 784; Dunod, *Prescription*, p. 338; 2 Proudhon, *Domaine de propriété*, n. 709; 1 Proudhon, *Usufruit*, no 97, p. 98; Pothier, *Bail à rente*, 1, 55, 57. [I. 505].

DECISIONS:—1. L'acte par lequel un seigneur donne la jouissance d'une terre, d'un emplacement, d'une place de moulin, du droit de prendre de l'eau d'une rivière pour faire marcher un moulin banal, pour plus de neuf années moyennant une redevance annuelle de deux cents minots de blé, avec la clause qu'il pourra reprendre le tout à l'expiration du terme, en payant l'estimation des améliorations, est un bail emphytéotique.—COURT OF APPEAL.—*Gugy & Chouinard*, 3 R. de L., p. 308.

2. Depuis l'abolition du système féodal le bail à cens n'étant plus reconnu, notre loi ne reconnaît comme baux à long terme que le bail à rente et le bail emphytéotique; et dans l'espèce actuelle le bail à long terme stipulé entre les parties est un bail emphytéotique.—LORANGER, J.—*Dufresne vs Lamontagne*, 8 L. C. J., p. 197.

3. A lease for twelve years, containing also a promise of sale, cannot be regarded as a lease giving rise to the summary proceeding provided for by C. C. P. 887 *et seq.*—Q. B.—*Lepine & Perm. Bldg. Soc. of Jacques-Cartier*, 20 L. C. J., p. 300.

4. There can be no *bail emphytéotique* without a *rente* or *canon* emphytéotique.—STUART, J.—*Blanchet vs Séminaire de Québec*, 15 L. C. R., p. 104.

Digitized by Google

5. Before the coming into force of the Civil Code, the obligation of improving the property was not an essential obligation in an emphyteutic lease.—JETTÉ, J.—*Cossit vs Lemieux*, 25 L. C. J., p. 317, 5 L. N., p. 10.

6. That a lease made, since the coming into force of the Code for much more than a nominal rent and containing no stipulation obliging the lessor to improve the leased lands, will not be deemed of an emphyteutic nature, although it be made for a term of twenty nine years. That the lessee's transfer to K. of his rights and obligations under the lease, although made with the assent and concurrence of the lessor, and although the lessor afterwards, for years, dealt with K. alone and transferred the rent to a third party as being due by K. did not affect a novation of the lessee's liability for rent.—MCCORD, J.—*Credit Foncier Franco-Canadien vs Young*, 9 Q. L. R., p. 317.

568. The duration of emphyteusis cannot exceed ninety-nine years and must be for more than nine.—C. S. L. C., c. 50 ss. 1, 2, 3; 2 Anc. Deniz., vo. *Emphytéose*, p. 296; 7 Nouv. Deniz., *eod. verbo*, n. 6, p. 538; 13 *Ibid.*, p. 280; 1 Dict. de Droit, p. 783; 1 Domat, p. 221; 1 Bourjon, p. 1; 2 Sebire et Carteret, 221; Pothier, *Bail à rente*, 45. [I. 505.]

569. Emphyteusis carries with it alienation; so long as it lasts, the lessee enjoys all the rights attached to the quality of a proprietor. He alone can constitute it who has the free disposal of his property.—Domat, liv. 1, tit. 4, s. 10, n. 5: 6 Guyot, Rép., vo. *Emphytéose*, 682; 2 Anc. Deniz., *eod. verbo*, n. 2, p. 296; 7 Nouv. Deniz., *eod. verbo*, § 2, n. 6, p. 539; 13 *Ibid.*, p. 280; 1 Dict. de Droit, p. 784; 3 Delvincourt, p, 185; Pothier, 111. [I. 505.]

DECISIONS:—1. The capital of the indemnity paid into court on the expropriation by a Railway company of land included in a *bail emphytéotique* is to be awarded to the lessee, on giving security, in preference to the lessor. A lessee under a *bail emphytéotique* is proprietor of the land leased and is not obliged to be content with the interest of the monies deposited in court as such indemnity.—C. R.—*Ex parte Grand Trunk Ry.*, 6 L. C. R., p. 54.

2. Un immeuble détenu par le preneur emphytéote, après l'expiration du bail, peut être valablement saisi comme appartenant au bailleur auquel il doit revenir.—Q. B.—*Huot & Danais*, 8 L. C. R., p. 235.

570. The lessee who is in the exercise of his rights, may alienate, transfer and hypothecate the immoveable so leased, without prejudice to the rights of the lessor; if he be not in the exercise of his rights, he can only do so with judicial authorization and formalities.—Domat, *loc. cit.*, n. 6; Lacombe, p. 262; 2 Argou, 304; 6 Guyot, Rép., 681-2; 1 Dict. de Droit, 784; 7 Nouv. Deniz., 539, 543; 1 Duranton, nn. 76,

Digitized by Google

77, 78, 80 ; 2 Sebire et Carteret,, 681-2 : Fœlix et Henrion, *Rente foncières*, p. 24. [I. 505.]

571. Immoveables held under emphyteusis may be seized as real property, under execution against the lessee by his creditors, who may bring them to sale with the formalities of a sheriff's sale.—6 Guyot, Rép., 682 ; 1 Dict. de Droit, 785 ; 2 Anc. Deniz., p. 297 ; 7 Nouv. Deniz , 542 ; C. C. P. 710. [I. 505 to 507, III. 377.]

DECISIONS :—1. La vente de ce qui reste à courir d'un bail emphytéotique désigné comme tel dans l'avertissement du shérif, impose à l'adjudicataire l'obligation de payer le canon emphytéotique, quoique cela ne soit pas expressément dit dans cet avertissement et quoiqu'il n'y ait pas d'opposition à fin de charge à cet effet; et conséquemment, le créancier, à qui est due cette rente ou canon emphytéotique, ne peut pas demander à se faire indemniser à même le prix de l'adjudication, sous le prétexte que sa rente et ses autres droits, résultant du bail sont perdus, parce qu'il n'a pas fait d'opposition à fin de charge.—Duval & Meredith, JJ.—*Méthot vs O'Callaghan*, 2 L. C. R., p. 331.

2. Un propriétaire qui a laissé vendre sa propriété sur un défendeur qui ne la détenait qu'à titre de bail emphytéotique, peut demander d'être indemnisé de la perte de sa propriété sur le prix de l'adjudication.—C. R.—*Murphy vs O'Donovan & Lampson*, 2 L. C. R, p. 333.

3. Les droits d'un bailleur emphytéotique peuvent être saisis et décrétés comme un immeuble par les créanciers du bailleur.—Dans ce cas, le domaine direct seul est saisi et vendu. Le décret n'affecte pas les droits de l'emphytéote et ne change en aucune manière les conditions de l'emphytéose, seulement l'emphytéote change de créancier et doit payer le canon emphytéotique à l'adjudicataire au lieu de payer à son bailleur comme avant le décret.—Loranger, J.—*Prescourst vs Vidal*, 1 R. L., p. 42.

4. Upon the proceeds of the sale of a long lease *bail emphytéotique*, the lessor cannot claim arrears due in virtue of such lease to the prejudice of a creditor or of the lessee who has duly registered before him.—C. R—*Têtu vs Martin*, 7 L. C. R., p. 42.

5. Un créancier d'une rente emphytéotique peut poursuivre en déclaration d'hypothèque le représentant de l'adjudicataire de l'immeuble qui est hypothéqué pour la sûreté du paiement de cette rente, si la vente du shérif a été faite sujette à cette rente, quoique le contrat de vente du shérif ne fasse pas mention de la rente, et en ce cas le contrat de vente sera déclaré faux.—Q. B.—*Carpenter vs Déry*, 8 R. L., p. 283.

6. In the case of the *décret* of an immoveable property, if it be stated in the sheriff's advertisement that such immoveable is held *à bail emphytéotique* in virtue of a lease granted to the Defendant, the *adjudicataire* will be bound to pay the *rente* or *canon emphytéotique* for the future. The *rente* or *canon emphytéotique* is an indication of the *dominium directum*, the property of which lies with the lessor and for the preservation of which he is not bound to produce an opposition *afin de charge*. When it is made to appear that the sale is a sale of a *bail emphytéotique* it is the duty of the intending *adjudicataire* to enquire into the condition of the lease.—Stuart, J.—*Blanchet & Séminaire de Québec*, 1 L. C. R., p. 104.

Digitized by Google

572. The lessee is entitled to bring a possessory action against all those who disturb him in his enjoyment and even against the lessor.—2 Proudhon, *Dom. de propriété*, p. 325; 2 Sebire et Carteret, 456; Pothier, n. 3. [I. 507.]

SECTION II—OF THE RIGHTS AND OBLIGATIONS OF THE LESSOR AND OF THE LESSEE

573. The lessor is obliged to guarantee the lessee, and to secure him in the enjoyment of the immoveable leased, during the whole time legally agreed upon.

He is also obliged to resume such immoveable and to discharge the lessee from the rent or dues stipulated, in the case of the latter wishing to leave it, unless there is an agreement to the contrary.—Domat, *loc., cit.*, n. 7; 6 Guyot, Rép., 682-3; 2 Dict. de droit, 786; 2 Argou, 300 et seq.; 7 Nouv. Demiz., 542; 2 Sebire et Carteret, 455; Pothier, 32, 121, 123 et seq. [I. 507.]

DECISION:—Under an emphyteutic lease, the lessor has not, for the payment of the rent and other obligations of the lease, the privilege which he has under an ordinary lease on the moveable property found in or removed from the premises leased.—Q. B.—*Alliott & Eastern Townships Bank*, 2 Q. B. R., p. 172.

574. On his part the lessee is bound to pay annually the emphyteutic rent; if he allow three years to pass without doing so, he may be judicially declared to have forfeited the immoveable, although there be no stipulation on that subject.—*Col.*, L. 2, *De jure emphyt;* Carondas, liv. 7, rép. 39; Domat, *loc. cit.*, n. 10; 1 Dict. de droit, 784; 7 Nouv. Deniz., p. 542; 13 Nouv. Deniz., 281; Pothier, 1, 35, 40, 38. [I. 507.]

DECISIONS:—1. On a *bail emphytéotique*, rent in arrear for three years is a good cause of resiliation.—K. B.—*Samson vs Woolsey*, 2 R. de L., p. 439.

2. Le droit de commise s'exerce à l'égard d'un bail emphytéotique sans aucune stipulation par le défaut de paiement de la rente ou canon emphytéotique pendant trois années et sans aucune mise en demeure de payer. Le juge a le pouvoir d'accorder un sursis à l'exécution du jugement prononçant la résolution de ce bail, avec faculté au preneur de payer pendant ce délai et de garder possession de l'héritage.—Loranger, J.—*Dufresne vs Lamontagne*, 8 L. C. J., p. 197.

575. The rent is payable in the whole, without the lessee having a right to claim its remission or diminution, either on account of sterility or of unavoidable accidents which may have destroyed the harvest or hindered the enjoyment, or even for the loss of a part of

Digitized by Google

the land.—*Cod.*, L. 1, *De jure emphyt.*; Domat, *loc. cit.*, n. 8; 1 Dict. de Droit, 784; 6 Guyot, Rép., 682; 7 Nouv. Deniz., 543; 2 Sebire et Carteret, n. 27, p. 456; Pothier, 14, 15, 16. [I. 507.]

576. The lessee is held for all the real rights and land charges to which the property is subjected.—6 Guyot, Rép., 682; Domat, *loc. cit.*, s. 20; 7 Nouv. Deniz., 543; 2 Sebire et Carteret, 456; Pothier, 66; see also 110. [I. 507.]

DECISIONS:—1. A party holding land within the city of Montreal, under a lease from the government for twenty-one years, renewable on certain condition, is an owner of such land, within the meaning of the by-law of the corporation imposing assessments on real property.—Q. B.—*Gould & City of Montreal*, 3 L. C. J., p. 197.

2. The lessee of a lot and water power near the Lachine Canal and within the limits of the City of Montreal from the Commissioners of Public Works, under a lease for twenty-one years, renewable for ever in the terms mentioned in the lease, has a *jus in re* and is liable for city taxes and assessments as proprietor of the leased property. Such lease is an alienation of the *domaine utile*, the Crown having only the *domaine directe*.—C. R.—*Ex parte Harvey*, 5 L. C. R. p. 378.

577. He is bound to make the improvements which he has undertaken, as well as all greater or lesser repairs.

He may be forced to make them even before the expiration of the lease, if he neglect to do so, and the land suffer thereby any considerable deterioration.—Domat, *loc. cit.*, s. 10, n. 9; 6 Guyot, Rép., 682; 7 Nouv. Deniz., 544; 2 Sebire et Carteret, 457; Pothier, 57, 58, 59 et seq. [I. 507.]

DECISION:—In an action upon a lease *emphytéotique*, upon the plaintiff's demand of re-entry because no house was erected on the lot leased, within a year as stipulated, it was held that the defendant must necessarily be put *en demeure*, before the institution of the action.—K. B.—*Balston vs Pozer*, 2 R. de L., p. 440.

578. The lessee has not the right to deteriorate the immoveable leased; if he commit any waste which greatly diminishes its value, the lessor may have him expelled and condemned to restore the things to their former condition.—Domat, *loc. cit.*; Novelle 120, c. 8; 6 Guyot, Rép., 682; 7 Nouv. Denitz., 543; Pothier, 42 et seq. [I. 507.]

SECTION III.—OF THE TERMINATION OF EMPHYTEUSIS.

579. Emphyteusis is not subject to tacit renewal.

It ends:

1. By the expiration of the time for which it was contracted, or after ninety-nine years, in case a longer term has been stipulated;

Digitized by Google

2. By forfeiture judicially pronounced for the causes set forth in articles 574 and 578, or for other legal causes ;

3. By the total loss of the estate leased ;

4. By abandonment.—Domat, *loc. cit.*, n. 7 ; 6 Nouv. Denizt., vo. *Déguerpissement*, § 2, nn. 1 et seq. ; 7 *Ibid.*, p. 542 ; 1 Duvergier, n. 181 ; Troplong, *Louage*, n. 40 ; 2 Sebire et Carteret, *Bail emphyt.*, nn. 31 et seq. ; 2 Devilleneuve et Gilbert, *Emphytéose*, n. 37 ; Pothier, 53, 121, 116, 114, 190. [I. 509.]

DECISIONS :—1. An action of *résiliation* for the non-performance of the conditions of a emphyteutic lease, cannot be maintained if the defendant has not been put *en demeure*.—K. B.—*Balston vs Pozer*, 2 R. de L, p. 440.

2. The forfeiture of a *bail emphytéotique*, for non-payment of the rent, will not be decreed, if it be proved that before the action was instituted the rent due was tendered and refused.—K. B.—*Burns vs Richards*, 2 R. de L, p. 206.

3. Un immeuble détenu par le preneur emphytéote, après l'expiration du bail, peut être valablement saisi comme appartenant an bailleur auquel il doit revenir.—Q. B.—*Huot & Danais*, 8 L. C. R., p. 235.

580. The lessee is only allowed to abandon if he have satisfied for the past all the obligations which result from the lease, and particularly if he have paid or tendered all arrears of the dues, and made the improvements agreed upon.—Paris, 109 ; 1 Laurière, 327 ; Loyseau, *loc. cit.*, et n. 13 ; 6 Nouv. Deniz., 123 ; 7 *Ibid.*, 542 ; Pothier, 147 et seq. 185 et seq. [I. 509.]

581. At the end of the lease, in whatever way it happens, the lessee must give up, in good condition, the property received from the lessor, as well as the buildings he obliged himself to construct, but he is not bound to repair those which he has erected without being obliged to do so.—Brodeau sur Louet, E., *som.* 22 ; 1 Dict. de Droit, 783-6 ; 7 Nouv, Deniz, 543-4 ; 2 Sebire et Carteret, 457 ; Pothier, 43, 45 ; Thev. d'Ess. (Can. Ed.) p. 207. [I. 509.]

582. As to improvements which the lessee has made voluntarily, without being bound to do so, the lessor has the option of either keeping them, upon paying what they cost or their actual value, or permitting the lessee, if the latter can do so with advantage to himself and without deteriorating the land, to remove them at his own expense ; otherwise, in each case, they belong, without indemnification, to the lessor, who may, nevertheless, compel the lessee to remove them, in conformity with the provisions of article 417.—2 Argou, 303-4 ; Dict. de Droit, 786 ; 7 Nouv. Deniz., 544 et seq. ; 1 Duvergier, n. 174 ; 2 Devilleneuve et Gilbert, p. 370 ; Pothier, 41 ; Thev. d'Ess. (Can. Ed.) p. 207. [I. 509.]

Digitized by Google

BOOK THIRD.

OF THE ACQUISITION AND EXERCISE OF RIGHTS OF PROPERTY.

GENERAL PROVISIONS.

583. Ownership in property is acquired by prehension or occupation, by accession, by descent, by will, by contract, by prescription, and otherwise by the effect of law and of obligations.—Pothier, *Propriété*, nn. 19 et seq.; 3 Marcadé, pp. 1, 2, 3; 3 Boileux, pp. 4 et seq.; C. N., 711, 712. [II. 255.]

DECISION:—Celui qui est à la poursuite d'un animal sauvage est censé en être le premier occupant, tant qu'il est à sa poursuite, et il n'est pas permis à un autre de s'en emparer pendant ce temps, et dans ce cas ce dernier doit en payer la valeur au poursuivant.—BERTHELOT, J.—*Charlebois vs Raymond*, 12 L. C. J., p. 55.

584. Things which have no owner are held to belong to the crown.—*Cod. de bonis vac.*, L. 1; *ff De adquirendo rerum; Instit.*, lib. 2, tit. 1, § 12; Domat, *Dr. public*, liv. 1, tit. 6, sec. 3, nn. 1, 2, 3, 4; 3 Despeisses, p. 150, No 3; C. C. 401; 4 Touillier, pp. 6, 38, 51, 320; C. N., 713. [II. 255.]

585. There are things which have no owner and the use of which is common to all. The enjoyment of these is regulated by laws of public policy.—*ff* L. 2, *De divisione rerum*; Pothier, *Propriété*, nn. 21, 22, 51, 60; 3 Toullier, p. 22; 3 Marcadé, p. 5; C. N., 714. [II. 255.]

586. The ownership of a treasure rests with him who finds it in his own property; if he find it in the property of another, it belongs half to him, and the other half to the owner of the property.

A treasure is any buried or hidden thing of which no one can prove himself owner, and which is discovered by chance.—*ff* L. 31, § 1, *De aquirendo rerum; Cod.*, L. *unica De thesauris*; *Instit.*, lib. 2,

Digitized by Google

tit. 1, § 39; Domat, *Dr. pub.*, liv. 1, tit. 6, sec. 3, n. 7; 3 Despeisses, p. 144, sec. 4; Pothier, *Prop.*, nn. 64, 65, 66; Fenet-Pothier, sur art. 716, pp. 186 et seq.; 3 Marcadé, pp. 6, 7; C. N., 716. [II. 255.]

587. The right of hunting and fishing is governed by particular laws of public policy, subject to the legally acquired rights of individuals.—*ff* L. *De aquirendo rerum*; *Instit.*, lib. 2, tit. 1, §§ 2, 12; Ord. 1516, art. 89; Ord. 1681, liv. 5 p. 356; Ord. 1669, titres 30, 31; C. S. C., c. 62; C. S. L. C., c. 29; Pothier, *Propriété*, nn. 33, 47, 51, 52, 53, 56; 4 Merlin, Rép., vo. *Chasse*, § 2, pp. 120 et seq.; 3 Marcadé, p. 5; C. N., 715. [II. 255.]

DECISION:—See case noted at C. C. 583.

588. Things which are the produce of the sea, or are drawn from its bottom, found floating on its waters, or cast upon its shores, and which never had an owner, belong, by right of occupancy, to the finder who has appropriated them.—Stephen's Blackstone, Book, 4 pp. 436, 525 et seq.; Contra, *Ord. de la Marine*, liv. 4, tit 9, art. 19 20; C. N., 717. [II. 255.]

589. Things once possessed, which are afterwards found at sea, or on the sea shore, or their price, if they have been sold, continue to be the property of the original owner, if he claim them, and if he do not, they belong to the crown; save in all cases the claims of those who find and preserve them, for the salvage and preservation.—Stat. Imp. 17-18 Vict., c. 104; Blackstone, *loc. cit.*; Ord de la Marine, liv. 4, tit. 9, art. 24, et Valin, on same; C. N., 717. [II. 255.]

590. Whatever relates to wrecked ships and their cargo, the articles and fragments coming from them, the mode of disposing of them and of the price they bring, and the right of salvage, is specially regulated, according to the same principles, by the imperial statute, intituled: *The Merchant Shipping Act*, 1854.—Stat. Imp. 17-18 Vict., c. 104, ss. 443-500; C. N., 717. [II. 257.]

Amendment.—See the Act intituled: "An Act respecting wrecks, casualties and Salvages," which consolidates and amends the Acts D. 32-33 Vict., cap. 38 and D. 36 Vict., cap. 55.—R. S. C., cap. 81.

591. The grass upon the beaches of the river St. Lawrence which are not private property, is, in certain places, granted by special laws or particular titles to the riparian proprietor, under the restrictions imposed by law or by regulations.

Digitized by Google

In other cases, if the crown have not otherwise disposed of it, it belongs by right of occupancy to him who cuts it.—C. S. L, C. c. 27, ss. 1, 2, [II. 257.]

592. Things found in or upon the river St.Lawrence, or the navigable portions of its tributaries, or upon the banks thereof, must be advertised and disposed of in the manner provided by special provincial laws.—12 Vic., c. 114, ss. 98, 99 ; 22 Vict., c. 12 [II. 257.]

Amendment : See the act intituled " An Act respecting Wreck and Salvage," with regard to the disposition of effects found in the port of Quebec, which consolidates the 38th section of the Act D. 36 Vict. cap. 55.—R. S. C., Vol. III, p. 798.

DECISION :—Where an anchor was found in the river St Lawrence in the Harbour of Montreal by the master of a vessel, the two thirds of the net proceeds of the sale will, under the act 22 Vict., cap. 12, be awarded to the master and the intervention of the owners of the vessel claiming the proceeds will be dismissed. —BERTHELOT, J.—*McGuire vs Trinity House of Montreal*, 15 L. C. R., p. 411.

593. Things found on the ground, on the public highways or elsewhere, even on the property of others, or which are otherwise without a known owner, are, in many cases, subject to special laws, as to the public notices to be given, the owner's right to claim them, the indemnification of the finder, their sale, and the appropriation of their price.

In the absence of such provisions, the owner who has not voluntarily abandoned them, may claim them in the ordinary manner, subject to the payment, when due, of an indemnity to the person who found and preserved them ; if they be not claimed, they belong to such person by right of occupancy.

Unnavigable rivers are, for the purposes of this article, considered as places on land.—Domat, liv. 1, tit. 6, s. 3, no 6 ; Pothier. *prop.*., nn 67 et seq ; C. N., 717. [II. 257.]

594. Among the things subject to the special provisions mentioned in the preceding article are ;

1. Wood or other objects obstructing beaches and the adjoining lands ;

2. Unclained goods in the hands of wharfingers, warehouse keepers, and carriers either by land or by water ;

3. Articles remaining in the post-office with dead letters ;

4. Things suspected to have been stolen, remaining in the hand of officers of justice ;

Digitized by Google

5. Animals found straying.—C. S. L. C., c. 66; c. 104; c. 26, ss. 9, 10; c. 28, s. 2.—C. S. C., c. 31, ss. 29, 30, 31. [II 257.]

595. Certain matters which come under the heading of the present book are incidentally treated in the books preceding. [III. 377.]

TITLE FIRST.

OF SUCCESSIONS.

GENERAL PROVISIONS.

596. Succession is the transmission by law or by the will of man, to one or more persons, of the property and the transmissible rights and obligations of a deceased person.

In another acceptation the word "succession" means the universality of the things thus transmitted.—Pothier, *Successions*, p. 2; 4 Toullier, p. 63; 6 Pand. Franç., pp. 7, 8; 1 Rogron, *Code Civil*, p. 610, [II. 257.]

DECISION:—When the wife was given the revenue derived from a certain capital sum during her life, with power to bequeath the said capital sum at her death, failing which the original testator bequeathed the same to certain of his children, and the wife died, making certain specific legacies and bequeathing "*the rest and residue of her estate*" to certain persons, it was held that, by this universal residuary legacy, she had effectually exercised the power of appointment confered on her by her husband's will over the capital.—PAPINEAU, J.—*Gemley vs Low*, M. L. R., 2 S. C., p. 311.

597. Abintestate succession is that which is established by law alone, and testamentary succession that which is derived from the will of man. The former takes place only in default of the latter.

Gifts in contemplation of death partake of the nature of testamentary successions.

The person to whom either of those successions devolves is called heir.—Pothier, *Successions*, pp. 1, 2: C. S. L. C., c. 34, s. 2; 1 Rogron,

Digitized by Google

p. 610 ; 11 Merlin, Rép., pp. 152 et seq. ; 6 Pand. Franç., pp. 115 et seq. ; C. L., 875. [II. 257 to 259.]

598. Abintestate succession is subdivided into legitimate succession, which is conferred by law upon relatives, and irregular succession, when, in default of relatives, it devolves upon persons not related.—Pothier, *Suc.*, pp. 1, 2 ; 6 Pand. Franç., p. 22 ; C. L., 873, 874 ; C. N., 756, 766. [I. 259.]

599. The law, in regulating a succession, considers neither the origin nor the nature of the property composing it. The whole forms but one inheritance which is transmitted and divided according to uniform rules, or the dispositions made by the proprietor.—6 Pand. Franç., 199 et seq. ; Dard, 161, 162, note (*c*) ; C. S. L. C., c. 34, s. 2, § 1 ; C. N., 732 ; Thev. d'Ess. (Can. Ed.) pp. 52-89. [II. 259.]

CHAPTER FIRST.

OF THE OPENING OF SUCCESSIONS AND OF THE SEIZIN OF HEIRS.

SECTION I.—OF THE OPENING OF SUCCESSIONS.

600. The place where a succession devolves is determined by the domicile.—*Cod., L. unica, Ubi de hæreditate agitur ;* 2 Pand. Franç., 408 ; 1 Toullier, p. 321 ; 4 *Ibid.*, p. 413 ; 1 Delvincourt, 46 ; C. N., 110. [II. 259.]

601. Successions devolve by natural death, and also by civil death.—Pothier, *Duc.*, c. 3, s. 1 ; *Com.*, n. 502 ; *Intr. aux Cout.*, n. 176 ; *Orl.*, n, 36 ; Paris, 337 ; C. C., 36 ; Fenet-Pothier, p. 189 ; C. N., 718. [II. 259.]

602. Successions devolve by civil death from the moment it is incurred.—*ff* L. 10, § 1, *De pœnis* ; L. 6, *De in justo rumpto, irrito ;* Rogron, p. 611 ; 1 Chabot, *Suc.*, pp. 13, 14 ; C. N., 719. [II. 261.]

603. Where several persons, respectively called to the succession of each other, perish by one and the same accident, so that it is impossible to ascertain which of them died first, the presumption of

Digitized by Google

survivorship is determined by circumstances, and, in their absence, by the considerations of age and sex, conformably to the rules contained in the following articles.—*ff* L. 32, § 14, *De don. inter virum et uxorem ; De rebus dubiis ;* Pothier, *Suc.*, c. 3, s. 1, § 1 ; *Intr. tit.* 17, *Orl.*, n. 38 ; Merlin, Rép., vo. *Mort*, § 2, art. 2 ; 6 Pand. Franç., 124 et seq. ; 2 Maleville, 167 ; C. N., 720. [II. 261.]

604. Where those who perished together were under fifteen years of age, the eldest is presumed to have survived ;

If they were all above the age of sixty, the youngest is presumed to have survived ;

If some were under the age of fifteen and others over that of sixty, the former are presumed to have survived ;

If some were under fifteen or over sixty years of age, and the others in the intermediate age, the presumption of survivorship is in favor of the latter.—*ff* L. 22, L. 23, *De rebus dubiis ;* 4 Poullain du Parc, n. 43, p. 30 ; 1 Chabot, *Suc.*, sur art. 722, pp. 30 et seq. ; C. N. 721. [II. 261.]

605. If those who perished together were all between the full ages of fifteen and sixty, and of the same sex, the order of nature is followed, according to which the youngest is presumed to survive ;

But if they were of different sexes, the male is always presumed to have survived.—*ff loc. cit.* ; 4 Poullain du Parc, *loc. cit. ;* 1 Chabot, *Suc.*, sur art. 722 ; 2 *Ibid.*, p. 32 ; 3 Marcadé, pp. 15 et seq. ; Rogron, sur art. 722 ; C. N., 722. [II. 261.]

SECTION II.—OF THE SEIZIN OF HEIRS.

606. Abintestate successions pass to the lawful heirs in the order established by law ; in default of such heirs, they devolve to the surviving consort, and if there be none, they fall to the crown.—*ff L. unic. undè vir et uxor ; Cod., eod. tit.*, L. 1 ; L. 4, *De bonis vacant ;* Pothier, *Suc.*, c. 1. s. 2, art. 3, § 3 ; 1 Toullier, p. 66 ; 2 Demante, p. 9 ; 6 Pand. Franç., pp. 141-2 ; C. N., 723. [II. 261.]

607. The lawful heirs, when they inherit, are seized by law alone of the property, rights and actions of the deceased, subject to the obligation of discharging all the liabilities of the succession ; but the surviving consort and the crown require to be judicially put in possession, in the manner set forth in the Code of Civil Procedure.—

Digitized by Google

Paris, 318; Pocquet, pp. 195-6; 3 Laurière, pp. 80 et seq.; Poth
Suc., ch. 3, sec. 2; *Propriété*, nn. 248, 261, 332, 336; *Possession*, n.
Orl., tit., 17, n. 301; 4 Toullier, pp. 91, 97, 99, 258 et seq.—2 Dema
p. 9, n. 24; 6 Pand. Franç., pp. 144 et seq.; p. 155, n. 85; p. 163
Maleville, 170; C. N., 724. [II. 261.]

DECISIONS:—1. Une partie qui se prétend héritière ne peut poursu
comme créancière, lorsqu'en même temps elle maintient qu'elle est héritièr
JOHNSON, J.—*Fraser vs Abbott*, 5 R. L., p. 234.

2. The heirs at law of a deceased wife are seized by operation of law of
share in any immoveable *conquêt* of the community and the only effect of t
not registering under C. C. 2098 is that transfers &c., granted by them are
—Q. B.—*Dallaire & Gravelle*, 22 L. C. J., p. 286.

3. Qu'un seul de plusieurs héritiers indivis peut porter l'action pétit
contre le tiers qui n'a aucun droit à la succession et revendiquer, par ell
totalité d'un immeuble lui appartenant que ce tiers détient.—CASAULT, J.—
vs Bédard, 11 Q. L. R., p. 318.

4. Que les héritiers ont droit aux intérêts que produisent les legs particul
tant qu'ils n'ont pas été acquittés par l'exécuteur testamentaire.—PAPINEAU,
Mayer vs Léveillé,, M. L. R., 3 S. C., p. 190.

CHAPTER SECOND.

OF THE QUALITIES REQUISITE TO INHERIT.

608. In order to inherit, it is necessary to be civilly in existe
at the moment when the succession devolves; thus, the following
incapable of inheriting:

1. Persons who are not yet conceived;

2. Infants who are not viable when born;

3. Persons who are civilly dead.—*ff* L. 6, L. 7, *De suis et*
hered; Paris, 337; Pocquet, pp. 197-8; 4 Poullain du Parc, pp. 26
seq; Pothier, *Suc.*, c. 1, sec. 2; *Intr.*, tit. 17, *Orl.*, nn. 6, 8; Lamoign
tit. 41, art. 3, 4, 5; 2 Maleville, 173; 6 Pand. Franç., 165; Dard, p. 1
C. N., 725. [II. 263.]

609. Aliens may inherit in Lower Canada in the same man
as British subjects.—C. C. 25; C. S. C., c. 8, sec. 9; Pothier, *Pers.*
578, *Suc.*, sec. 2; 6 Pand. Franç., pp. 180 et seq.; C. N., 726. [II. 26

610. The following persons are unworthy of inheriting and,
such, are excluded from successions:

1. He who has been convicted of killing or attempting to kill
deceased;

Digitized by Google

2. He who has brought against the deceased a capital charge, adjudged to be calumnious;

3. The heir of full age, who, being cognizant of the murder of the deceased, has failed to give judicial information of it.—*ff* L. 9, *De jure fisci*; L. 7, § 4, *De bonis damnatorum;* L. 9, §§ 1, 2; *De his quæ ut indignis*; Pocquet, 197; Lacombe, v. *Indignité*, nn. 1, 2, 3, 4, 5; Pothier, *Suc.*, c. 1, sec. 2, art. 4, § 2; *Intr. tit.* 17, *Orl.*, n. 14; 6 Pand. Franç., 181 et seq.; 2 Maleville, 174; 1 Rogron, 623-4; Fenet-Pothier, 19, 194; 1 Chabot, pp. 69 et seq.; C. N., 727. [II. 263.]

611. The failure to inform cannot however be set up against the ascendants or descendants, or the husband or wife of the murderer, nor against the brothers or sisters, uncles or aunts, nephews or nieces of the murderer, nor against persons allied to him in the same degrees. —Cod., L. 13, L. 17, *De his qui accusari non possunt;* 1 Henrys, liv. 4, ch. 6, quest. 101; Lebrun, *Suc.*, liv. 3, ch. 9, n. 6; Ord. de 1690, titre *Des Plaintes;* Louet et Brodeau, C., ch. 25; H., ch. 5; S. ch. 20; 1 Furgole, 611 et seq.; 6 Pand. Franç., 191-3-4; 2 Maleville, 176; 1 Chabot, 83; 2 Bousquet, 28; C. N,, 728. [II. 263.]

612. Any heir who is excluded from the succession by reason of unworthiness is bound to restore all the fruits and revenues that he has received since the succession devolved.—1 Furgole, 598; 6 Pand. Franç., 193; 4 Toullier, 117; 2 Maleville, 177; 2 Bousquet, 29; C. N., 729. [II. 263.]

613. The children of an unworthy heir are not excluded from the succession by reason of the fault of their father, if they come to it in their own right and without the aid of representation, which in this case does not take place.—Lebrun, *Suc.*, liv. 3, c. 9, n. 6; Pothier, *Suc.*, ch. 1, s. 2, art. 4, §§ 1, 2; ch. 2, s. 1, art. 1, § 2; Lacombe, *eod. verbo*, n. 5; Fenet-Pothier, 195; C. N., 730. [II. 263.]

CHAPTER THIRD.

OF THE DIFFERENT ORDERS OF SUCCESSION.

SECTION I.—GENERAL PROVISIONS.

614. Successions devolve to the children and descendants of the deceased, and to his ascendants and collateral relations, in the order

Digitized by Google

and according to the rules hereinafter laid down.—*ff* L. 7, *De bonis damnatorum;* Pothier, *Suc.*, p. 40; *Intr.* tit. 17, *Orl.*, n. 15; 2 Pand. Franç., 198; Dard, notes B. C.; C. N., 731. [II. 265.]

Amendment: See the act intituled "An Act respecting the proof of Heirship," which is too long to cite here.—Q. 41 Vict., cap. 10.

615. Proximity of relationship is determined by the number of generations, each generation forming a degree.—*ff* L. 10, § 10, *De gradibus et affinibus*, Pothier, *Mariage*, no 123; *Suc.*, ch. 1, sec. 2, art. 3; 4 Toullier. p. 165; 6 Pand. Franç., 212 et seq.—C. N., 735. [II 265.]

616. The succession of degrees forms the line.

The succession of degrees between persons who descend one from the other is called the direct line; that between persons who do not descend the one from the other, but from a common ancestor, is called the collateral line.

The direct line is distinguished into the direct descending, and the direct ascending line.

The former connects the ancestor with his descendants; the latter connects the individual with his ancestors.—*ff* L. 1, *De gradibus et affinibus*; Pothier, *Mar.*, nn. 121-2; *Suc.*, ch. 1. sec. 2, art. 3; C. N., 736. [II. 265.]

617. In the direct line the degrees are computed to be as many as there are generations between the persons; thus the son is, with respect to the father, in the first degree, the grandson, in the second, and reciprocally as to the father and grand-father in respect of the son and grandson.—*ff* L. 10, § 9, *loc. cit.*; Pothier, *loc. cit.*; 2 Maleville, 183; C. N., 737. [II. 265.]

618. In the collateral line the degrees are reckoned by the generations from one relation up to and not including the common ancestor, and from the latter to the other relation.

Thus two brothers are in the second degree, uncle and nephew in the third, cousins-german in the fourth, and so on.—*ff* L. 1, § 1, *loc. cit; Instit. De gratibus et cognat.*, § 7; Pothier, *Suc.*, ch. 1, sec. 2, art. 3; 4 Toullier, p. 168; 6 Pand. Franç., 212; 2 Maleville, 183; C. N., 738. [II. 265.]

SECTION II.—OF REPRESENTATION.

619. Representation is a fiction of law, the effect of which is to put the representatives in the place, in the degree and in the rights of

Digitized by Google

the person represented.—*Novelle* 18, ch. 4; Pothier, *Suc.*, p. 40; *Intr. tit.* 17, *Orl.*, n. 17; 4 Poullain du Parc, pp. 26-27; 2 Maleville, 184; C. N., 739. [II.265.]

620. Representation takes place without limit in the direct line descending; it is allowed whether the children of the deceased compete with the descendants of a predeceased child, or whether all the children of the deceased having died before him, the descendants of these children happen to be in equal or unequal degrees amongst themselves.—*Cod.*, L. 3, *De suis et legit.*; *Inst.*, *De hæreditatibus quæ ab intest*; *Novelles* 118, 127, ch. 1; Paris, 319; Lamoignon, tit. 41, art. 20; Pothier, *Suc.*, p. 41; 3 Laurière, 82; 2 Pand. Franç., 220; C. N., 740. [II. 265 to 267.]

DECISION:—Dans l'espèce les termes *enfants alors vivants*, comprennent les petits-enfants, descendant en ligne directe de la testatrice; et par droit de représentation, les dits petits enfants tiennent directement de leur bisaïeule, et non de leur mère, leur droit au legs de la propriété de l'immeuble par eux réclamé.—TASCHEREAU, J.—*Glackmeyer vs Cité de Montréal*, 10 L. C. R., p. 18.

621. Representation does not take place in favor of ascendants; the nearest in each line excludes the more distant.—*Novelle* 118, ch. 2; 4 Poullain du Parc, p. 27, n. 36; Pothier, *Suc.*, 79; 1 Boucher d'Argis, 11; Lamoignon, tit. 41, art. 26; 4 Toullier, 191; C. N., 741. [II. 267.]

622. In the collateral line representation is admitted only where nephews and nieces succeed to their uncle and aunt concurrently with the brother and sister of the deceased.—Paris, 320; *Novelle* 118, ch. 4; Pocquet, p. 206; 1 Laurière, sur art. 320; Pothier, *Suc.*, pp. 94, 101; 6 Pand. Franç., 233; 2 Maleville, 185; C. N., 742. [II. 267.]

623. In all cases where representation is admitted, the partition is effected according to roots; if one root have several branches, the subdivision is also made according to roots in each branch, and the members of the same branch divide among themselves by heads.—*Novelle* 118, c. 1; Paris, 320, 321; 3 Laurière, pp. 87, 93; 1 Argou, 436; Pocquet, 206; Pothier, *Suc.*, 46; Guyot, Rép., vo. *Successions*, p. 575; Lamoignon, tit. 41, art. 23; 6 Pand. Franç., 240; 2 Maleville, 186; C. N., 743. [II. 267.]

624. Living persons cannot be represented, but only those who are naturally or civilly dead.

A person may represent him whose succession he has renounced. —*Novelle* 118, c. 1; 4 Poullain du Parc, n. 38; 1 Argou, 437; Pothier,

Digitized by Google

Suc., ch. 2, sec. 1, art. 1 ; *Intr. tit.* 17, *Orl.*, n. 18 ; Lamoignon, tit. 41, art. 25 ; 6 Pand. Franç. 243 ; 2 Maleville, 187 ; C. N., 744. [II. 267.]

SECTION III.—OF SUCCESSIONS DEVOLVING TO DESCENDANTS.

625. Children or their descendants succeed to their father and mother, grandfathers and grandmothers, or other ascendants, without distinction of sex or primogeniture, and whether they are the issue of the same or of different marriages.

They inherit in equal portions and by heads when they are all in the same degree and in their own right ; they inherit by roots, when all, or some of them, come by representation.—*Novelle* 118, c. 1 ; Paris, 302 ; 3 Laurière, pp. 11, 12 ; Pothier, *Suc.*, c. 2, sec. 1, art. 1, § 4 ; sec. 3, § 1 ; C. N., 745 ; Thev. d'Ess. (Can. Ed.) p. 143. [II. 267.]

SECTION IV.—OF SUCCESSIONS DEVOLVING TO ASCENDANTS.

626. [If a person dying without issue, leave his father and mother and also brothers or sisters, or nephews or nieces in the first degree, the succession is divided into two equal portions, one of which devolves to the father and mother, who share it equally, and the other to the brothers and sisters, nephews and nieces of the deceased, according to the rules laid down in the following section.]—6 Pand. Franç., 248-253 ; 2 Maleville, 189 ; 2 Bousquet, 58 ; 2 Marcadé, 76-7 ; C. L., 899 ; C. N., 748. [II. 269 to 271.]

DECISION :—Le père est héritier de son enfant, des biens mobiliers laissés par lui, à son décès, au cas où l'enfant est mort *intestat* et sans enfants, et le père héritera de son dit enfant dans la propriété du legs fait par le testateur en faveur de la mère de l'enfant décédé sans hoirs et *intestat*.—Q. B.—*Reid & Prevost*, 1 L. C. J., p. 320.

627. [If, in the case of the preceding article, the father or mother have previously died, the share he or she would have received accrues to the survivor of them.]—6 Pand. Franç., 280 ; 2 Maleville, 194-5 ; 2 Bousquet, 59, 61 ; 2 Marcadé, 78 ; C. L., 900 ; C. N., 749. [II. 271.]

DECISION :—See case noted at C. C. 1384.—Q. B.—*Lecours & Viau*, 32 L. C. J., p. 8.

628. [If the deceased leave no issue nor brothers nor sisters, nephews nor nieces in the first degree, nor father nor mother, but only

Digitized by Google

other ascendants, the latter succeed to him to the exclusion of all other collaterals.]—6 Pand. Franç., 249 et seq.; 2 Maleville, 189; C. L., 901; C. N., 746. [II. 271.]

629. [In the case of the preceding article the succession is divided equally between the ascendants of the paternal line and those of the maternal line.

The ascendant nearest in degree takes the half accruing to his line to the exclusion of all others.

Ascendants in the same degree inherit by heads in their line.]—6 Pand. Franç., pp. 249 et seq.; 2 Maleville, p. 189; 2 Marcadé, p. 77; 2 Bousquet, 55 et seq.; C. L., 902; C. N., 746. [II. 271.]

630. Ascendants inherit, to the exclusion of all others, property given by them to their children or other descendants who die without issue, where the objects given are still in kind in the succession, and if they have been alienated, the price, if still due, accrues to such ascendants.

They also inherit the right which the donee may have had of resuming the property thus given.—*ff* L. 6, *De jure dotium; Cod.*, L. 2, *De bonis quæ liberis;* Paris, 313; Orl., 315; Lamoignon, tit. 41, art. 35; Pothier, *Suc.*, c. 2, s. 2; 3 Boileux, pp. 82 et seq.; 1 Rogron, p. 136; 3 Marcadé, p. 76; 2 Maleville, pp. 190 et seq.; 4 *Conférences du Code*, sur art. 747, pp. 29 et seq.; 2 Bousquet, p. 57; 6 Pand. Franç., pp. 259 et seq.; C. L., 904; C. N., 747. [II. 271.]

DECISIONS:—1. The right which ascendants have of resuming the property given by them to their descendants is a right of succession or inheritance, and such property can be seized for the debts of the succession of the donee.—JETTÉ, J.—*Corse vs Drummond*, 24 L. C. J., p. 254, 3 L. N., p. 341.

2. Que le défaut d'enrégistrement d'une donation comportant prohibition d'aliéner ne peut priver le donateur du droit de retour en sa faveur résultant de C. C. 630; parce qu'à raison de C. C. 2098, le donataire ne peut conférer aucun droit sur la propriété au préjudice du donateur sans avoir lui-même fait enrégistrer son titre d'acquisition.—Q. B.—*Pepin & Courchène*, 10 R. L., p. 77.

SECTION V.—OF COLLATERAL SUCCESSIONS.

631. [If the father and mother of a person dying without issue, or one of them, have survived him, his brothers and sisters, as well as his nephews and nieces in the first degree, are entitled to one half of the succession.]—6 Pand. Franç., 288; 4 Toullier, pp. 205 et seq.;

Digitized by Google

2 Malleville, p. 195 et seq. ; C. C., 626 ; C. L., 907 ; C. N., 751. [II. 273.]

632. [If both father and mother have previously died, the brothers, sisters, and nephews and nieces in the first degree, of the deceased succeed to him, to the exclusion of the ascendants and the other collaterals. They succeed either in their own right, or by representation as provided in the second section of this chapter.]—*Novelle* 118, c. 2 ; 127, c, 1 ; 4 Toullier, 178, 200-218 ; 6 Pand. Franç 282 et seq. [II. 273.]

633. [The division of the half or of the whole of the succession coming to the brothers, sisters, nephews or nieces, according to the terms of the two preceding articles, is effected in equal portions among them, if they be all born of the same marriage ; if they be the issue of different marriages, an equal division is made between the two lines paternal and maternal of the deceased, those of the whole blood sharing in each line, and those of the half blood sharing each in his own line only. If there be brothers and sisters, nephews and nieces on one side only, they inherit the whole of the succession to the exclusion of all the relations of the other line.] — 6 Pand. Franç., 289 ; 2 Marcadé, pp, 78, 79 ; 4 Toullier, 216 ; Rogron, 646 ; 2 Bousquet, 63 ; 3 Boileux, 104 ; C. L., 909 ; C. N., 752. [II. 273.]

634. [If the deceased, having left no issue, nor father, nor mother, nor brothers, nor sisters, nor nephews, nor nieces in the first degree, leave ascendants in one line only, the nearest of such ascendants takes one half of the succession, the other half of which devolves to the nearest collateral relation of the other line.

If, in the same case, there be no ascendant, the whole succession is divided into two equal portions, one of which devolves to the nearest collateral relation of the paternal line, and the other to the nearest of the maternal line.]

Among collaterals, saving the case of representation, the nearest excludes all the others ; those who are in the same degree partake by heads.—6 Pand. Franç., 299 ; 4 Toullier, 219 ; 2 Maleville, 198 ; Rogron, 647 ; 3 Marcadé, 80 ; C. L., 910 ; C. N., 753. [II. 273.]

635. Relations beyond the twelfth degree do not inherit.

In default of relations within the heritable degree in one line, the relations of the other line inherit the whole.—C. N., 755. [II. 273.]

Digitized by Google

636. When the deceased leaves no relations within the heritable degree, his succession belongs to his surviving consort.—*ff L. unic. undè vir et uxor ; Cod., eod. tit ;* 3 Poullain du Parc, p. 310 ; Pothier, *Intr.*, tit. 17, *Orl.*, n. 35 ; Loyseau, *Seigneuries*, c. 12, n. 104 ; 4 Toullier, nn. 283, 319 ; C. N., 767. [II. 275.]

637. In default of a surviving consort, the succession falls to the crown.—Cod., L. 1, L. 2, L. 3, L. 4, L. 5, *De bonis vacantibus* ; Paris, 167 ; Pothier, *Suc.*, c. 6 ; Loyseau, *Seigneuries*, c. 12, nn. 101 et seq. ; 6 Nouv. Deniz., v. *Déshérence*, 323 ; C. C. 401 ; Dard, *autorités citées sur art.* 768 ; C. N. 768. [II. 275.]

DECISIONS :—1. Dans le cas où la Couronne demande l'envoi en possession d'une succession en déshérence, en vertu de l'article 637 du code civil, elle doit donner avis de cette demande dans les journaux, et à défaut de ce faire sa demande sera déboutée. Les successions en déshérence appartiennent, d'après l'acte de l'Amérique Britannique du Nord de 1867, au gouvernement fédéral et non aux gouvernements locaux. — Taschereau, J. — *Regina vs Caron*, I Q. L. R., p. 177.

2. Une femme accusée du meurtre de son mari peut, dans l'époque intermédiaire de l'accusation et de la condamnation juridique, contracter un engagement valable pour se faire défendre de l'accusation.—Un avocat peut réclamer en justice le montant d'obligations à lui consenties par l'accusée pour se faire défendre, lors qu'aucune preuve de surcharge ou de contrainte morale n'est faite. Les biens de la femme condamnée ayant été confisqués au profit de la Couronne, cette dernière ne pouvait s'en emparer qu'à la charge de payer l'obligation contractée comme susdit, comme toute autre obligation ; et si la Couronne n'eût pas fait remise des biens confisqués aux enfants de la condamnée, elle aurait été obligée d'acquitter ces obligations. Les enfants ayant eu la remise de ces biens, sont aux droits comme aux obligations de la Couronne et partant chargés de ces obligations.—Loranger, J.—*Gaultier vs Joutras*, 1 R. L., p. 473.

638. In the case of the two preceding articles a statement of the property of the succession, coming to the surviving consort or to the crown, must be made, at their diligence, by means of an inventory or other equivalent instrument, before they can claim to be authorized to take possession.—Pothier, *Suc.*, p. 229 ; 6 Nouv. Deniz., 319, 321 ; 4 Toullier, pp 289, 32, 535 ; 1 Chabot, *Suc.*, p. 592 ; 2 Demante, 35, 36 ; C. N., 769. [II. 275.]

DECISION :—Where an estate is claimed *à titre de déshérence* or *à titre de bâtardise* by the crown, the creditors of the estate have a right to make good their claims by proceedings for an account against the curator of the estate before it can be placed beyond their reach by a transfer to the crown.—Meredith, C. J.—*Atty. Gen. vs Price*, 9 L. C. R., p. 12.

Digitized by Google

639. This possession must be demanded in the superior court of original jurisdiction of the district in which the succession opens, and the suit is prosecuted and adjudicated upon in the manner and according to the forms determined in the Code of Civil Procedure.—6 Nouv. Deniz., 323; C. C., 607; C. C. P., 1131; 4 Toullier, pp. 321 et seq.; 1 Chabot, 592; 2 Demante, 37; C. N., 770. [II. 275.]

640. Whenever the prescribed rules and formalities have not been complied with, the heirs, if any appear, may claim an indemnity, and even damages, according to circumstances, for the consequent losses incurred.—1 Chabot, 598 et seq.; 2 Demante, 38; C. L. 927; C. N., 772. [II. 275.]

CHAPTER FOURTH.

OF ACCEPTANCE AND RENUNCIATION OF SUCCESSIONS.

SECTION I.—OF ACCEPTANCE OF SUCCESSIONS.

641. No one is bound to accept a succession which has devolved to him.—*Cod.*, L. 16, *De jure deliberandi*; Paris, 316; Pothier, *Propriété*, n. 248; *Suc.*, c. 3, sec. 2; 2 Maleville, p. 260; C. N., 775. [II. 275.]

642. A succession may be accepted purely and simply, or under benefit of inventory.—*ff* L. 57, *De adquirendâ vel omit. hereditate*; *Cod.*, L. 22, *De jure deliberandi*; Pothier, *Suc.*, c. 2, s. 3; *Intr. tit.* 17, *Orl.*, n. 44; 2 Maleville, 259; C. N., 774, 788, 789, 793. [II. 275.]

643. A married woman cannot validly accept a succession without being authorized thereto by her husband, or judicially, according to the provisions of chapter six, of the title *Of Marriage*.

Successions which devolve to minors and interdicted persons cannot be validly accepted otherwise than in conformity with the provisions contained in the titles which treat respectively of minority and of majority.—C. C., 177, 178, 180, 301, 302; Pothier, *Puis. marit.*, n. 33, *Suc.*, c. 3, s. 3, art. 1, § 1; *Intr. tit.* 17, *Orl.*, n. 40; 6 Pand. Franç., 363; 2 Maleville, 227; C. N., 776, 217, 461, 462, 463. [II. 275 to 277.]

Digitized by Google

DECISIONS :—1. La nullité de l'acceptation d'une succession faite par le tuteur pour ses mineurs, sur avis d'un conseil de famille, ne peut être prononcée dans une cause où les mineurs ne sont pas parties.—Q. B.—*Rolland & Michaud*, 9 R. L., p. 19.

2. A tutor cannot accept or renounce a succession which falls to his pupil, without authorization being granted on the advice of a family council.—C. R.—*Johns vs Patton*, 31 L. C. J., p. 96, 10 L. N., p. 45, M. L. R., 3 S. C., p. 113.

See also cases noted at C. C. 301.

644. The effect of acceptance reaches back to the day when the succession devolved.—*ff* L. 138, L. 193, *De regulis juris* ; Paris, 318 ; Pothier, *Propriété*, n. 248 ; C. N., 777. [II. 277.]

DECISION :—By accepting a succession, the children lose their right to dower created by the marriage of their father.—Q. B.—*Betournay & Moquin*, 2 Q. B. R., p. 187, 5 L. N., p. 327.

645. Acceptance may be either express or tacit ; it is express when a person assumes the title or quality of heir in an authentic or private act ; it is tacit when the heir performs an act which necessarily implies his intention to accept, and which he would have no right to perform except in his capacity of heir.—*ff* L. 20, L. 42, L. 78, L. 86, L. 88, *De adquirendâ vel omit. hæred.* ; *Cod.*, L. 2, L. 10, *De jure deliberandi* ; Paris, 317 ; Orl., 334 ; Pothier, *Suc.*, c. 3, s. 3, art. 1 ; C. N., 778. [II. 277.]

DECISIONS :—1. Un héritier collatéral ne peut faire des actes d'acceptation avant la renonciation d'un héritier en ligne directe. Un héritier collatéral ne sera pas considéré comme ayant fait des actes d'acceptation avant d'avoir eu connaissance de la renonciation de l'héritier plus proche.—TASCHEREAU, J.—*Lavoie vs Lefrançois*, 15 L. C. R., p. 145.

2. Il est hors de doute que le successible fait acte d'héritier lorsqu'il dispose à titre onéreux ou à titre lucratif d'un bien meuble ou immeuble de l'hérédité.—Q. B.—*Ayotte & Boucher*, 3 Q. B. R., p. 123, 6 L. N., p. 26, 8 Q. L. R., p. 328.—SUPREME COURT.—9 S. C. R., p. 460, C. D., p. 502.

3. Q. B.—Similar decision, *Betournay & Moquin*, 2 Q. B. R., p. 187, 5 L. N., p. 327.

See also cases noted at C. C. 651.

646. Mere conservatory acts and those of supervision and provisional administration are not acts of acceptance, if the title and quality of heir have not been assumed.—*ff* L. 20, L. 78, *De adquirendâ vel omit. hæred.* ; Lebrun, *Suc.*, liv. 3, c. 8, s. 2, n, 4 ; Pothier, *Suc.*, c. 3, s. 3, art. 1 ; Serres, p. 318 ; Merlin, vo. *Héritier*, s. 2, § 1, nn. 3, 4 ; vo. *Acceptation de success.*, n. 2 ; 4 Toullier, p. 348 ; C. N. 779. [II. 277.]

DECISION :—In the present case the acts complained of were merely conservatory and administrative.—SUPREME COURT.—*Ayotte & Boucher*, 9 S. C. R., p. 460, C. D., p. 502.—Q. B.—3 Q. B. R., p. 123, 6 L. N., p. 26, 8 Q. L. R., p. 328.

Digitized by Google

647. A gift, sale or transfer of his heritable rights made by a coheir, either to a stranger or to all or some of his coheirs, implies, on his part, an acceptance of the succession.

The same presumption results: 1. From the renunciation made, even gratuitously, by one heir in favor of one or more of his coheirs; 2. From the renunciation made in favor even of all the coheirs without distinction, if he receive the price of his renunciation.—*ff* L. 24, *De aquirendâ vel omit. hæred.*; L. 6, *De regulis juris;* Pothier, *Vente*, n. 530, *Suc.*, c. 3; c. 5, sec. 3, art. 1; 6 Pand. Franç., 378; 2 Maleville, 228; C. N., 780. [II. 277.]

648. Where the person to whom a succession has devolved dies without having renounced or expressly or tacitly accepted it, his heirs may accept or reject it in his stead.—*ff* L. 86, *De aquirendâ vel omit. hæred*; *Cod.*, L. 3, L. 19, *De jure delib.*; Pothier, *Suc.*, c. 3, sec. 2; *Intr. tit.* 17, *Orl.*, n. 41, 64; 6 Pand. Franç., 379, 380; 2 Maleville, 229; C. N., 781. [II. 277.]

649. [If such heirs do not agree to accept or to reject the succession, it is held to be accepted under benefit of inventory.] — C. N., 782. [II. 277,]

★ **650.** A person of full age cannot impugn his express or tacit acceptance of a succession, unless such acceptance has been the result of fraud, fear or violence; he can never disclaim it on the ground of lesion only, unless the succession has become absorbed or notably diminished by the discovery of a will which was unknown at the time of the acceptance.—*ff* L. 22, *De adquirendâ vel omit. hæred.*; *Cod.*, L. 4, *De rep. vel abst*; Lacombe, 576; 16 Guyot, 561-2; 6 Pothier, *Com.*, n. 532, *Suc.*, pp. 138-9; 3 Furgole, 413; 6 Pand. Franç., 381; 2 Maleville, 231, C. N., 783. [II. 277 to 279.]

DECISIONS:—1. Que l'acceptation d'une succession par un majeur n'est pas valable si cette acceptation a été le résultat du dol. Dans l'espèce il y a eu dol.—Supreme Court.—*Ayotte & Boucher*, 9 S. C. R., p. 460, C. D., p. 502.—Q. B.—8 Q. L. R., p. 328, 3 Q. B. R., p. 123, 6 L. N., p. 26.

2. Where an act of heirship, involving the acceptance of a succession, has been made by error of law, it forms no ground for setting aside the acceptance.—Q. B.—*Betournay & Moquin*, 5 L. N., p. 327, 2 Q. B. R., p. 187.

SECTION II.—OF RENUNCIATION OF SUCCESSIONS.

651. Renunciation of a succession is not presumed; it is effected by a notarial deed, or by a judicial declaration which is recorded.—4

Digitized by Google

Furgole, 52 et seq; Lacombe, 576 ; Pothier *Suc.*, c. 3, sec. 3, § 3 ; *Intr. tit.* 17, *Orl.*, nn. 64–5 ; Merlin, Rép., vo. *Renonciation*, § 1, n. 3 ; C. N., 784. [II. 279.]

DECISIONS :—1. La renonciation par un enfant mâle à la succession future ne s'étend pas aux legs particuliers. D'ailleurs cette renonciation ne s'applique qu'à la succession *ab intestat*, et non pas à la succession testamentaire.—BRUNEAU, J.—*Fréchette vs Fréchette*, 6 L. C. J., p. 329.

2. Aucun acte fait par un héritier après sa renonciation à la succession, ne peut être considéré comme un acte d'héritier, parce qu'il ne peut plus accepter une fois qu'il a renoncé.—TASCHEREAU, J.—*Lavoie vs Lefrançois*, 15 L. C. R., p. 145.

3. In the case submitted, the presumptive heirs having claimed moneys due to the deceased and kept in her hands moneys left by him, she cannot legally renounce the estate and such renunciation is of no effect.—Q. B.—*Orr & Fisher*, 6 L. C. R., p. 28.—C. R.—M. C. R., p. 106.

4. Parties sued hypothecarily, in respect of property held by them in virtue of a donation from the debtor, cannot plead the prescription of ten years, if they have become heirs at law of the debtor, by reason of his death since the date of the donation, and have not renounced his succession.—MONK, J.—*Berthelet vs Dease*, 12 L. C. J., p. 336.

652. An heir who renounces is deemed to have never been heir. — Pothier, *Suc.*, c. 3, sec. 2, alin. 9, 10 ; sec. 4, § 4, *Propriété* nn. 248, 261 ; C. N., 785. [II. 279.]

653. The share of a party renouncing accrues to his coheirs. If he be alone, the whole succession devolves to the next in degree.—*ff* L. 13, *De adquirendâ vel omit. hæred ;* L. 59, L. 63, L. 66, *De hæred. instit ; Cod.* L. 4, *De répud. vel abstin. hæred* ; Pothier. *Suc.*, ch. 3, sec. 2, 4, § 4, *Propriété*, n. 248 ; *Intr. tit.* 17, *Orl.*, nn. 39, 67 ; *Vente*, n. 546 ; 6 Pand. Franç., 385 et seq ; 4 Toullier, p. 196 ; 2 Maleville, 235 ; 3 Marcadé, 157 et seq ; C. N., 786. [II. 279.]

654. No one can take as the representative of an heir who has renounced. If the party renouncing be the sole heir in his degree, or if all his coheirs have renounced, the children take in their own right and inherit by heads.—Brodeau sur Louet, *Let. R*, ch. 17 ; Chenu, cent. 1, *quest.* 22 ; Leprêtre, cent. 1, ch. 23 ; 2 Henrys, liv. 4, *quest.* 4 ; 6 Pand. Franç., 392 ; C. N., 787. [II. 279.]

655. The creditors of an heir who renounces, to the prejudice of their rights, may procure the rescission of such renunciation, and afterwards accept the succession themselves, in right of their debtor, and in his place and stead.

Digitized by Google

In such case the renunciation is annulled only in favor of the creditors who have demanded the rescission, and merely to the extent of their claims. It is not annulled in favor of the heir who has renounced.—*ff* L. 6, *De his quæ in fraudem;* Pothier, *Suc.*, ch. 3, s. 3, art. 1, § 2; *Intr.* tit. 17, *Orl.*, n. 4; 6 Pand. Franç., 394; C. N., 788. [II. 279.]

656. An heir is never too late to renounce the succession, as long as he has not formally or tacitly accepted it.—Pothier, *Suc.*, p. 163, *Com.*, nn. 534, 544, 556; *Intr. Cout.*, tit. 10, n. 93; Lacombe, p. 577; 2 Maleville, 238; C. N., 789. [II. 279.]

657. An heir who has renounced a succession may nevertheless resume it, so long as it has not been accepted by another having a right to it; but he resumes it in the state in which it then is, and without prejudice to the rights which third parties have acquired upon the property of such succession, by prescription or by acts validly made while it was vacant.—Lebrun, *Suc.*, ch. 3, s. 3, art. 1, p. 136; C. C., 302; 2 Maleville, 238; 6 Pand. Franç., 397; *Contrà*, Pothier, *Suc.*, p. 136; C. N., 790. [II. 279.]

DECISION:—No act of an heir after his renunciation can be considered as an act of heirship, inasmuch as once having renounced he cannot accept.—TASCHEREAU, J.—*Lavoie vs Lefrançois*, 15 L. C. R., p. 145.

658. No one can renounce the succession of a living person, or alienate the contingent rights he may claim therein, unless it is by contract of marriage.—Lacombe, 570 et seq.; Pothier, *Suc.*, ch. 1, sec. 2, art. 4, §§ 2, 3, ch. 3, sec. 3, art. 1, § 2; 2 Maleville, 238; 2 Bousquet, 116 et seq.; 3 Marcadé, 167; C. C., 1061; C. N., 791. [II. 281.]

DECISIONS:—1. Renunciation by children to the future succession of their parents is valid and presumed made for the advantage of the other heirs and binds the renunciants. In principle, renunciations to future successions of living persons is ineffective except in marriage contracts.—Q. B.—*Crevier dit Bellerive & Rocheleau*, 16 L. C. R., p. 328.

2. Qu'une clause d'un contrat de mariage, par laquelle certains meubles et effets mentionnés au dit contrat, sont donnés par ses père et mère au donataire "pour lui tenir lieu de tous droits et prétentions de légitimes mobiliers et immobiliers dans les successions futures et à écheoir de ses père et mère, sans par lui pouvoir en demander davantage," est une renonciation complète et entière par le demandeur à la succession future de ses père et mère.—MCCORD, J.—*Nolin vs Aubert*, 11 Q. L. R., p. 266.

659. Any heir who has abstracted or concealed property belonging to a succession forfeits the right of renouncing it; notwithstand-

Digitized by Google

ing his subsequent renunciation he remains unconditional heir, without right to claim any share in the property abstracted or concealed. —*ff* L. 71, § 4, *De adquir. vel omit. hæred.*; Pothier, *Suc.*, ch. 3, art. 2, § 3, *Com.*, n. 690; *Orl.*, tit. X, note 7, sur art. 204; Merlin, Rép., vo. *Recélé*, n. 2; C. N., 792. [II. 281.]

DECISIONS:—1. The plaintiff was heiress at law to the defendant's vendors but had renounced to the estate. The question was whether the plaintiff, after renunciation, had done anything to render herself liable as heiress at law. She had appropriated £40 belonging to the estate, but she had done so telling the curator of the estate of it. This, the Superior Court held, was perhaps a wrongful act, but was not an *acte d'héritier*. In the Court of Appeals it was, however, held in the same case, that the presumptive heiress having collected moneys due to the deceased and kept in her hands moneys left by him, could not legally renounce the estate and that such renunciation was of no effect.—Q. B.—*Orr & Fisher*, 6 L. C. R., p. 28.—C. R.—M. C. R., p. 106.

2. La renonciation faite par une femme à la succession testamentaire de son mari, ne sera pas affectée par le fait que, comme exécutrice du testament, elle aura reçu une somme d'argent qu'elle se serait appropriée, en déduction de son douaire préfix.—MACKAY, J.—*Ackerman vs Gauthier*, 4 R. L., p. 224.

SECTION III.—OF THE FORMALITIES OF ACCEPTANCE, OF BENEFIT OF INVENTORY AND ITS EFFECTS, AND OF THE OBLIGATIONS OF THE BENEFICIARY HEIR.

660. In order to obtain benefit of inventory the heir is bound to demand it by a petition to the court or to one of the judges of the court of superior original jurisdiction of the district in which the succession devolved; this petition is proceeded and adjudicated upon in the manner and form required by the Code of Civil Procedure.—Serres, 314; Rodier, *sur Ord.*, 1667, p. 95; 2 Edits et Ord., Canada, p. 104; 2 Beaubien, *Lois du B.-C.*, p. 43; C. N., 793. [II. 281.]

661. [The judgment granting the petition must be registered in the registry office of the division in which the succession devolved.]—[II. 281.]

662. Such demand must be preceded or followed by the making of a faithful and exact inventory of the property of the succession, before notaries, in the form and within the delays established by the rules of procedure.—Serres, 314; Rodier, 95; Pothier, *Suc.*, p. 143; *Intr. tit*, 17, *Orl.*, n. 48; 1 Deniz., 305 et seq.; C. N., 794. [II. 281.]

663. The beneficiary heir is also bound, if the majority of the creditors or other persons interested require it, to give good and suf-

Digitized by Google

ficient security for the value of the moveable property comprised in the inventory, and for whatever moneys, arising from the sale of immoveables, he may then or thereafter have in his hands.

In default of such security, the court may, according to circumstances, adjudge the heir to have forfeited the benefit of inventory, or order that the moveables be sold and that the proceeds, as well as the other moneys of the succession which he may have in hand, be deposited in court, to be applied in discharging the liabilities of the succession.—Pothier, *Intr tit.* 17, *Orl.*, n. 48 ; Lamoignon, p. 246 ; 2 Bousquet, 144 et seq. ; 2 Maleville, 251 ; C. N., 807. [II. 281.]

DECISION :—Que lorsque plusieurs héritiers présomptifs ont été envoyés en possession à la condition qu'ils fournissent caution, si quelques-uns d'eux refusent de fournir le cautionnement, ceux qui fournissent le cautionnement, seront envoyés seuls en possession.—McKay, J.—*Durocher vs Lauzon*, 12 R. L., p. 403.

664. The heir is allowed three months to make the inventory, counting from the time when the succession devolved.

He has moreover, in order to deliberate upon his acceptance or renunciation, a delay of forty days, which begin to run from the day of the expiration of the three months for the inventory, or from the day of the closing of the inventory, if it be completed within the three months.—*ff* L. 1, L. 2, L. 3, L. 4, *De jure deliberandi* ; *Cod.*, L. 22, §§ 2, 3, *De jure deliberandi* ; Ord. 1667, tit. 7, art. 1, 2, 3, 4, 5 ; Pothier, *Suc.*, c. 3, s. 5 ; *Intr. tit.* 17, *Orl.*, n. 68 ; 6 Pand. Franç., 413 ; C. N., 795. [II. 281.]

665. If however there be in the succession articles of a perishable nature, or of which the preservation is costly, the heir may cause them to be sold, without thereby incurring the presumption of having accepted ; but such sale must be made publicly, and after the notices and publications required by the rules of procedure.—*ff* L. 5, L. 6, *De jure delib.* ; L. 20, *De adquirendâ vel omit. hæred.* ; Pothier, *Suc.*, c. 3, sec. 3, § 5 ; C. N., 796. [II. 283.]

666. During the delays for making the inventory and deliberating, the heir cannot be compelled to assume the quality, nor can any sentence be obtained against him ; if he renounce at or before the expiration of the delays, the lawful costs he has incurred, up to that time, are chargeable to the succession.—*ff* L. 22, § 1, *De jure delib* ; Pothier, *Suc.*, ch. 3, sec. 5 ; *Intr. tit.* 17, *Orl.*, n. 68 ; C. N., 797. [II. 283.]

DECISION :—Que les héritiers peuvent renoncer à une succession même après enquête et audition au mérite dans une cause où ils sont poursuivis comme

Digitized by Google

tels, mais que tous frais seront à leur charge.—TASCHEREAU, J.—*Caumartin vs Archambault*, 10 L. N., p. 370.

667. After the expiration of the above delays, the heir may, in case an action is brought against him, demand a further delay, which the court seized of the case may grant or refuse, according to circumstances.—*ff* L. 3, *De jure delib;* Ord. 1667, tit. 7, art. 4; Pothier, *Suc.*, c. 3, sec. 5; *Intr. tit.* 17, *Orl.*, n. 70; C. N., 798. [II. 283.]

668. Costs of suit, in the case of the preceding article, are chargeable to the succession, if the heir prove that he had no knowledge of the death, or that the delays were insufficient, whether by reason of the situation of the property or of the contestations which have arisen; if he make no such proof, he remains personally liable for the costs.—Pothier, *loc. cit.*; 4 Toullier, pp. 353, 380; C. N., 799. [II. 283.]

DECISIONS:—1. *Abstention* from intermeddling with the affairs of a succession in the direct line, does not discharge the heirs of succession from the *poursuite* of a creditor.—But an *acte de renonciation* is required to exonerate them. The action against an heir, who had not renounced, but who appears and pleads a *renonciation* made after action brought, will be dismissed as to him, but with costs against him. A *renonciation* made before hearing on the merits is in time to discharge the heirs renouncing.—BERTHELOT, J.—*Montreal C. & D. Building Society vs Kerfut*, 4 L. C. J., p. 54.

2. Heirs at law, against whom it is sought to make a judgment executory, must pay costs up to the date of renunciation.—TORRANCE, J.—*Mulholland vs Halpin*, 17 L. C. J., p. 318.

669. The heir, nevertheless, after the expiration of the delays granted by article 664, and even of that given by the judge under article 667, still retains the power of making an inventory and of becoming beneficiary heir, if he have not otherwise performed any act of heirship, or if he have not been condemned, in his quality of unconditional heir, by a judgment which has become final.—*ff* L. 10, *De jure delib.*; *Cod.*, L., 19, *eod. tit.*; Pothier, *Suc.*, c. 3, s. 3, art. 1, 2; *Intr. tit.* 17, *Orl.*, nn. 46, 70; Merlin, Rép. vo. *Héritier*, sec. 2, 3, § 2; vo. *Succession*, sec. 1, § 5, n. 4; 6 Pand. Franc., 419 et seq.; 2 Malleville, 284 et seq.; C. N., 800. [II. 283.]

DECISION:—Des héritiers poursuivis pour qu'un jugement soit déclaré exécutoire contre eux peuvent renoncer à la succession même le jour fixé pour l'audition, s'ils n'ont pas fait acte d'héritier, mais en ce cas ils paieront les frais.—TORRANCE, J.—*Mulholland vs Halpin*, 5 R. L., p. 184.

670. An heir who is guilty of concealment, or who knowingly or fraudulently has omitted to include in the inventory any effects of

the succession, forfeits the benefit of inventory.—Cod. L. 22, §§ 10, 12, *De jure delib.*; Novelle 1, c. 2, § 2; Lapeyrère, *let. H*, n. 3; Pothier, *Suc.*, c. 3, sec. 3, art. 2, § 3; Furgole, *Testaments*, c. 3, sec. 6, n. 189; 6 Pand. Franc., 287; C. N., 801. [II. 283.]

DECISION:—A defendant who in the inventory of the effects of a succession, has omitted to include two debts he owed to the estate, will be condemned to add the same to the inventory, but will not be condemned to forfeit his interest therein in the absence of proof of fraud.—MONK, J.—*Shaw vs Cooper*, 6 L. C. J., p. 38.

671. The effect of benefit of inventory is to give the heir the advantage:

1. Of being liable for the debts of the succession only to the extent of the value of the property he has received from it;

2. Of not confounding his private property with that of the succession, and of retaining against the succession the right of demanding payment of his own claims.—*ff* L. 22, *De jure delib*; Pothier, *Com.*, n. 739, *Obl.*, 642, *Suc.*, c. 3, sec. 3, art. 2, §§ 1, 7, 8; *Intr.* tit. 17, *Orl.*, nn. 49, 52; Merlin, Rép., vo. *Bénéfice d'inventaire*, n. 15; 6 Pand. Franç., 287; C. N., 802. [II. 283.]

672. The beneficiary heir is charged to administer the property of the succession, and must render an account of his administration to the creditors and legatees. He cannot be compelled to pay out of his private property unless he has been put in default to produce his account and has failed to fulfil this obligation.

After the verification of the account he cannot be compelled to pay out of his private property except to the extent of the sums remaining in his hands.—Lebrun, *Suc.*, liv. 3, c. 4, § 85; Pothier, *Suc.*, c. 3, s. 3, art. 2, §§ 4, 6; *Intr.* tit. 17, *Orl.*, nn. 49, 54; 6 Pand. Franç., 425; 2 Maleville, 249; C. N., 803. [II. 285.]

DECISIONS:—1. Notwithstanding that the beneficiary heir is charged with the administration of the estate, nevertheless he may be sued directly and the property of the succession attached by any creditor having an executory title.—JETTÉ, J.—*Corse vs Drummond*, 24 L. C. J., p. 254.

2. Que lorsque des procédés sont faits par une partie dans la cause, en sa qualité d'héritier, sous bénéfice d'inventaire, et que cette partie est condamnée aux dépens, cette condamnation doit s'entendre, contre elle, dans la qualité qu'elle a prise, et qu'elle n'est pas censée condamnée personnellement aux dépens, à moins d'une disposition formelle du jugement pour des raisons spéciales comme pénalité.—Q. B.—*Ogden & Dawson*, 13 R. L., p. 448.

3. Que l'héritier bénéficiaire, comme l'héritier pur et simple, peut être poursuivi par action ordinaire et directe et condamné, *es-qualité*, au paiement des dettes de la succession.—Que la différence établie par la loi entre l'héritier pur

Digitized by Google

et simple et le bénéficiaire, est de rendre ce dernier simple administrateur, et lui donner le droit de ne pas confondre ses biens avec ceux de la succession, ceux-ci étant les seuls que les créanciers de la succession peuvent faire saisir et vendre en justice, pour le paiement de leurs créances.—Que l'action en reddition de compte est donnée aux créanciers de la succession contre l'héritier bénéficiaire, pour lui faire représenter tous les biens de la succession et de le faire condamner personnellement s'il y a lieu, mais sans préjudice à l'action directe, pour le faire condamner *es-qualité* d'héritier bénéficiaire, et faire saisir et vendre sur lui les biens de la succession.—Bourgeois, J.—*Trudel vs Letendre*, 15 R. L., p. 179.

673. In his administration of the property of the succession the beneficiary heir is bound to exercise all the care of a prudent administrator.—Lebrun, *Suc.*, liv. 3, ch. 5, n. 85; Ferrière, G. C., sur art. 342, gl. 1, § 2, n. 24; Pothier, *Suc.*, tit. 3, ch. 3, art. 2, § 4; C. C., 1064, 1070; 6 Pand. Franç., 429; C. N., 804. [II. 285.]

674. If the beneficiary heir cause the moveables of the succession to be sold, the sale must be made publicly and after the notices and publications required by the rules of procedure.

If he produce them in kind, he is liable only for the depreciation or the deterioration caused by his negligence.—Paris, 344; Pothier, *Suc.*, c. 3, s. 4, art. 2, § 5; *Orl.*, tit. 17, note 1, sur art. 342; 2 Bousquet, 142; 2 Maleville, 250; C. N., 805. [II. 285.]

675. With regard to the immoveables, if it become necessary to sell them, the sale, and the distribution of the price arising from it, are proceeded with in the manner and form followed with respect to the property of vacant successions, according to the rules laid down in the following section.—*Cod.*, L. 22, §§ 4, 5, 6, *De jure delib*; Pothier, *Suc. loc. cit.*; *Orl.*, art. 343; C. S. L. C., c. 88, sec. 10; Merlin, Rép., vo. *Bénéfice d'inventaire*, n. 9 *bis*; 4 Toullier, p. 385; 2 Maleville, 29; 6 Pand. Franç., 431; C. N., 806. [II. 285.]

676. The beneficiary heir, before disposing of the property of the succession, and after having made the inventory, gives notice of his quality in the manner established in the Code of Civil Procedure.

After two months from the giving of the first notice, if there be no actions, seizures or judicial contestations, by or between the creditors or legatees, the beneficiary heir may pay the creditors and legatees as they present themselves.

If there be actions, seizures or contestations of which he has

Digitized by Google

received judicial notice, he can only pay according to the directions of the court.—Pothier, *Suc.*, c. 3, sec. 3, art. 2, § 6; *Orl.*, tit. 17, n. 50; C. N., 808. [II. 285.]

677. The beneficiary heir may at all times:

1. Renounce the benefit of inventory, either judicially or by a notarial deed, to become unconditional heir, upon giving the same notices as when he accepted;

2. Render a final account in court, upon giving the same notices as when he accepted, and any other notices the court may direct, in order to be freed from his administration, whether he has legally paid, by order of the court or extra-judicially, all the debts of the succession, or whether he has duly paid them to the extent of the full value he has received.

By means of the discharge obtained from the court he may retain in kind any property remaining in his hands which forms part of the succession.—Extension of preceding article; C. N., 808. [II. 285.]

678. The beneficiary heir may likewise, with the consent of all parties interested, render an amicable account without judicial formalities.—Pothier, *Suc.*, c. 3, sec. 4, art. 2; Lamoignon, *Arrêtés*, tit. 43, art. 13. [II. 287.]

679. If the discharge be based upon the payment by the beneficiary heir of all the debts, without, however, his having paid out to the extent of what he received, he is not liberated as regards creditors who present themselves within three years from the discharge, and shew satisfactory cause for not having come forward within the required delays, but he is bound to satisfy them so long as he has not paid out the full value of what he received.—Pothier, *Suc.*, p. 146; C. N., 809. [II. 287.]

680. The discharge of the beneficiary heir does not prejudice the claim of the unpaid creditors against the legatee who has received to their detriment, unless the latter proves that they might have been paid by using due diligence, without his being left answerable towards other creditors who received in lieu of the claimant.—Pothier, *Suc.*, p. 146; *Intr.* tit. 17, *Orl.*, n. 51; C. N., 809. [II. 287.]

681. The expenses of seals, if any have been affixed, of the inventory, and of the account, are chargeable to the succession.—Cod.,

Digitized by Google

L. 22, §§ 4, 5, 6, *De jure delib.* ; Pothier, *Suc.*, c. 3, sect. 3, art. 2, § 6 ; *Intr.* tit. 17, *Orl.*, n. 50 ; C. C. P., 1322 et seq. [II. 287.]

682. The form and contents of the account which the beneficiary heir must render are regulated by the Code of Civil Procedure. —Pothier, *Suc.*, p. 146 ; C. C., 308 ; C. C. P., 1321 et seq. [II. 287.]

683. [In the collateral as well as in the direct line, the heir who accepts under benefit of inventory is not excluded by the one who offers to accept unconditionally.] [II. 287.]

SECTION IV.—OF VACANT SUCCESSIONS.

684. After the expiration of the delays for making the inventory and for deliberating, if no one come forward to claim a succession, if there be no known heirs, or if the known heirs have renounced, such succession is deemed vacant.—Pothier, *Suc.* p. 248 ; *Intr.* tit. 17, *Orl.*, n. 1 ; Guyot, Rép. vo. *Curateur*, p. 197 ; Merlin, Rép., vo. *Curateur*, § 3, n. 1 ; 6 Pand. Franç., 438 ; 2 Maleville, 209 ; C. N., 811, [II. 287.]

DECISIONS :—1. Qu'une succession devient vacante par la renonciation d'un légataire universel à son legs, sans qu'il soit nécessaire de recourir aux héritiers ou représentants d'un autre dégré.—Q. B.—*Viger & Robitaille*, 4 Q. B. R., p. 372.

2. Que la renonciation d'un légataire universel ne rend pas la succession vacante, s'il reste d'autres héritiers au testateur.—C. R.—*Banque Ville Marie vs Rocher*, M. L. R., 1 S. C., p. 409.

685. Upon the demand of any party interested, a curator to such succession is named by the court or by one of the judges of the court of original jurisdiction of the district in which it devolves.

This appointment is made in the manner and form prescribed by the Code of Civil Procedure.—*ff* L. 1. L. 2, *De curatoribus* ; Guyot, Rep., vo *Curateur*, p. 197 ; Merlin, Rép., vo *Héritier*, § 2, sect. 2 ; 6 Pand, Franç., 438 ; 2 Maleville. 254; C. C. P., 1331 et seq. [II. 287.]

686. Such curator gives notice of his quality, is sworn, and forthwith proceeds to the making of the inventory ; he administers the property of the succession, exercises and prosecutes all the rights pertaining to it, answers all claims brought against it, and renders an account of his administration.—*ff* L. 2, § 1, *De curatoribus* ; Guyot, *loc. cit* ; Merlin, *loc. cit* ; 4 Toullier, pp. 311-3 ; 2 Bousquet, pp. 150-1-2 ; C. N., 813. [II. 289.]

Digitized by Google

DECISIONS:—1. Un curateur à une succession vacante ne peut pas être poursuivi par un tiers auquel il aurait transporté sa créance contre telle succession, le curateur ne pouvant se poursuivre lui-même, ou se faire poursuivre par son propre cessionnaire.—BOWEN & DUVAL, JJ.—*Tessier vs Tessier*, 2 L. C. R, p. 63.

2. Un créancier qui a obtenu un jugement contre un curateur à une succession vacante, peut valablement diriger une action personnelle contre tel curateur pour lui faire rendre un compte de sa gestion.—Q. B.—*Volleau & Oliver*, 2 L. C. R., p. 462.

3. In an action to account, brought by the Plaintiff, as curator to a vacant succession, against the Defendant, as being found in possession of the estate, a plea is unfounded in law which sets forth that the deceased died in one of the United States of America and that her estate devolved upon her heirs, there being no vacant succession in this country, and that the Plaintiff was named curator without notice upon the petition of a party not a relative or creditor of the deceased nor interested in her estate and on the advice of parties not related or creditors or interested in the estate and without any necessity being shown for such appointment. The Defendant has no right or interest in contesting the quality of the curator on the ground of the objections above mentioned.—C. R.—*Sexton vs Boston*, 6 L. C. R., p. 180.

4. Where an estate is claimed *à titre de déshérence* or *à titre de bâtardise* by the crown, the creditors of the estate have a right to make good their claims by proceedings for an account against the curator of the estate before it can be placed beyond their reach by a transfer to the crown.—MEREDITH, J.—*Attorney General vs Price*, 9 L. C. R., p. 12.

5. Qu'un curateur à une succession vacante ne représente que la succession et le défunt, et qu'il ne peut demander la nullité d'un acte fait par le défunt en fraude de ces créanciers. Cette action n'appartient qu'aux créanciers.—Q. B.—*Lamarche & Pauzé*, 3 Q. B. R., p. 265.

6. Qu'un curateur nommé à une succession vacante par la renonciation des légataires ou héritiers n'a que les droits qu'auraient eus ces légataires ou héritiers.—C. R.—*Banque Ville Marie vs Rocher*, M. L. R., 1 S. C., p. 409.

687. After the appointment of the curator, if an heir or legatee appear who lays claim to the succession, he may cause the curatorship to be set aside for the future, and, upon proof of his rights, may obtain possession, by means of an action brought before the proper tribunal.—Dorion et Denéchaud, n. 857, Québec, 20 fev. 1832. [II. 289.]

688. The provisions of the third section of this chapter as to the form of the inventory, the notices to be given, the mode of administration, and the accounts to be rendered by beneficiary heirs, apply to curators of vacant successions.—4 Toullier, p. 400 ; 2 Delvincourt, p. 36 ; 2 Bousquet, p. 151 ; C. N., 814. [II. 289.]

DECISION:—Que les formalités imposées par la loi pour la vente par le curateur des biens meubles et immeubles d'une succession vacante sont impératives et sous aucune circonstance le juge ne peut sur simple requête en permettre la vente.—TASCHEREAU, J.—*Ex parte Lamothe*, M. L. R., 3 S. C., p. 147.

Digitized by Google

CHAPTER FIFTH.

OF PARTITION AND RETURNS.

SECTION I.—OF THE ACTION OF PARTITION AND ITS FORM.

689. No one can be compelled to remain in undivided ownership; a partition may always be demanded notwithstanding any prohibition or agreement to the contrary.

It may however be agreed or ordered that the partition shall be deferred during a limited time, if there be any reason of utility which justifies the delay.—*ff* L. 24, *Communi dividundo*; *Cod.*, L. 5, *eod. tit.*; Pothier, *Suc.*, p. 168, *Com.*, nn. 694, 697, 698, *Société*, nn. 162-3-6, 197; *Intr. tit.* 17, *Orl.*, nn. 71-2; Merlin, Rép., vo. *Partage*, § 1, nn. 2, 3; C. N., 815. [II. 289.]

DECISIONS:—1. Although an *usufruitier* be in possession, an *action en partage* will lie for the assignment of the portion which belongs to each heir in the property which is so possessed.—K. B.—*Poulin vs Falardeau*, 1 R. de L., p. 505.

2. Dans l'espèce, la substitution s'ouvrant en faveur d'un des appelés, avan de s'ouvrir pour les autres, cet appelé peut immédiatement demander sa part, sans attendre l'ouverture de la substitution en faveur de ses co-appelés.—Monk, J.—*Dumont vs Dumont*, 7 L. C. J., p. 12.

3. Testamentary quarterly payments to the alimentary beneficiaries of the net annual revenue applicable as *aliments*, are not the legal equivalent of the final partition and distribution of the *corpus* of the estate at the time fixed by the will for its final partition.—Privy Council.—*Muir & Muir*, 18 L. C. J., p. 96, 5 P. C. App., p. 66.

4. A partition, between parties of full age, of merely the usufruct of a property will be carried into effect without regard to substitutes whose rights are protected.—Privy Council.—*Guy & Guy*, 17 L. C. R., p. 122. (Not reported in Moor's P. C. Rep.

5. L'autorisation à vendre la part des mineurs dans une propriété donnée par le protonotaire, avec l'ordre à tous les copropriétaires d'accéder à telle vente et l'adjudication faite de tel immeuble conformément à cette autorisation, équivaut à la licitation et partage, et doit avoir tous les effets d'un partage vis-à-vis des créanciers de chaque cohéritier qui a pu hypothéquer quelque part indivise du dit immeuble.—L'accession de tous les copropriétaires à telle vente conformément à l'ordre du protonotaire, fait présumer chez ceux-ci l'intention de faire cesser l'indivision et de procéder à partage.—L'adjudicataire de l'immeuble ainsi vendu est censé avoir acquis le dit immeuble directement de la personne décédée.—Chagnon, J.—*Monette vs Molleur*, 6 R. L., p. 561.

6. Que la jouissance par indivis n'empêche pas les résultats nécessaires et inévitables de cette jouissance, qui sont que les fruits civils se divisent de plein droit entre les légataires usufruitiers dans la proportion de leur part respective, et

Digitized by Google

que chacun d'eux a droit de réclamer sa part et d'en faire l'objet d'une poursuite séparée et distincte.—C. R.—*Gray vs Quebec Bank*, 5 Q. L. R., p. 92.

7. Que le cohéritier et le communiste peuvent demander par opposition que la saisie de la part indivise d'un des cohéritiers ou des communistes, dans un immeuble dépendant de la succession ou de la communauté soit suspendue jusqu'après le partage pour lequel il y a poursuite pendante; mais qu'il ne peut pas demander la distraction de la totalité de l'immeuble de la saisie.—CASAULT, J.—*L'Hopital Général vs Gingras*, 10 Q. L. R., p. 136.

8. A seizure of the immoveables of a succession as the property of one of the heirs was held good for the share of such heir.—TORRANCE, J.—*Club Canadien vs Beaudry*, 4 L. N., p. 131.

9. Qu'un seul de plusieurs héritiers indivis peut porter l'action pétitoire contre le tiers, qui n'a aucun droit à la succession, et revendiquer, par elle, la totalité d'un immeuble lui appartenant, que ce tiers détient.—CASAULT, J.—*Bell vs Bédard*, 11 Q. L. R., p. 318.

10. Qu'un défendeur, dans une action en licitation et partage, n'a pas le droit de demander que le partage soit retardé jusqu'à ce que le demandeur, qui a administré les immeubles dont il demande la licitation, ait rendu un compte de cette administration.—MATHIEU, J.—*Roy vs Roy*, 12 R. L., p. 622.

11. Qu'une donation d'usufruit, faite à deux époux, conjointement, *pour eux-mêmes, leur vie durant, et la vie durant du survivant d'eux*, ne peut être divisée de manière à faire offrir aux enchères publiques, pour le paiement d'une dette du mari, la part de celui-ci, et à la faire attribuer, par adjudication, à un étranger qui jouirait ensuite, conjointement avec la femme, vu que cela répugne à l'ordre public et est impossible d'exécution.—Q. B.—*Bédard & Lebel*, 14 R. L., p. 351.

12. That a Railway cannot be seized and sold in part, even on a judgment by bond-holders, except in accordance with the dispositions of the special statute authorizing the creation of the mortgage or hypothec. A Railway is an indivisible, thing and can only be sold as a whole.—Q. B.—*Stephen & Hochelaga Bank*, M. L. R., 2 Q. B., p. 491.

13. That the proprietor *par indivis* has a right to bring an action of ejectment against a person holding the property solely by the will of a co-proprietor, the proprietor of an undivided share not having any right to lease the whole property, nor even his own share of it, without the consent of his co-proprietor.—Q. B.—*Stearns & Ross*, M. L. R., 2 Q. B., p. 379.—TORRANCE, J.—M. L. R., 1 S. C., p. 448.

14. See case noted at C. C. 1562.—MATHIEU, J.—*Kent vs Beaudin*, 16 R. L., p. 333.

690. Partition may be demanded even though one of the coheirs enjoys separately a part of the property of the succession, if there have been no act of partition, nor a sufficient possession to acquire prescription.—*Cod.*, L. 21, *De pactis;* L. 4, *Communi divid.*; Pothier, *Soc.*, n. 166, *Com.*, n. 698, *Suc.*, p. 169; *Intr. tit.* 17, *Orl.*, n. 72; Merlin, Rép., vo. *Prescription*, sec. 3, § 3, art. 1, n. 3; 2 Maleville, 257; 7 Pand. Franç., 53 et seq.; C. N., 816. [II. 289.]

Digitized by Google

691. Neither the tutor of a minor, nor the curator of an interdicted person or of an absentee, can demand the partition of the immoveables of a succession which has devolved to such minor, interdicted person or absentee, but he may be compelled to join in it, and in such case the partition is effected judicially, and with the formalities required for the alienation of the property of minors.

The tutor or curator may however demand the final partition of the moveables, and the provisional division of the immoveables of the succession.—Pothier, *Suc.*, c. 4, art. 1, § 2; *Com.*, nn. 695-6; *Personnes*, tit. 6, sec. 4, art. 3; *Soc.*, n. 164; C. C. 87 to 91 and 305; C. N., 817. [II. 289.]

692. A husband may, without the concurrence of his wife, demand the partition of the moveables or immoveables which have accrued to her and have fallen into the community. As to things which are excluded from it, the husband cannot demand their partition without the concurrence of his wife; he may however, if he have a right to enjoy her property, demand a provisional division.

The coheirs of the wife cannot demand a definitive partition without suing both husband and wife.—Pothier, *Puis. marit.*, nn. 83, 84; *Intr. tit.* 17, *Orl.*, n. 154; *Suc.*, c. 4, art. 1, § 2; 7 Pand. Franç., 63 et seq.; C. N., 818. [II. 289 to 291.]

693. If all the heirs be of full age, be present, and agree, the partition may be effected in such form and by such act as the parties interested deem proper.

If any of the heirs be absent or unwilling, if there be among them minors or interdicted persons, in all such cases the partition can only be effected judicially, and the rules laid down in the succeeding articles are to be followed.

If there be several minors represented by one tutor and having adverse interests, a special and separate tutor must be given to each, to represent him in the partition.—Pothier, *Suc.*, c. 4, art. 4; 7 Pand. Franç., 163; 2 Maleville, 268; C. N., 819, 838. [II. 291.]

694. The action of partition and the contestations which arise in it are submitted to the court of the place where the succession devolves, if it devolve in Lower Canada; if not, to the court of the place where the property is situate, or of the domicile of the defendant.

It is before this tribunal that licitations and the proceedings connected with them are to be effected.—7 Pand. Franç., 96; 2 Maleville, 261; C. S. L. C., c. 82, s. 27; C. N., 822. [II. 291.]

Digitized by Google

695. In the action of partition and its incidents the same proceedings are had as in ordinary suits, saving any modifications introduced by the Code of Civil Procedure.—Pothier, *Suc.*, c. 4, art. 4 ; C. N., 823 ; C. C. P., 919 et seq. [II. 291.]

696. The valuation of immoveables is made by experts who are chosen by the parties interested, or who, upon the refusal of such parties, are officially appointed.

The report of the experts must declare the grounds of the valuation, it must indicate whether the thing estimated can be conveniently divided, and in what manner, and must determine, in case of division, each of the portions which may be made of it, and the value of such portion.—Pothier, *Vente*, n. 516, *Société*, n. 168, *Suc.*, c. 4, s. 4 ; *Intr. tit.* 17, *Orl.*, n. 75 ; C. N., 824. [II. 291.]

697. Each of the coheirs may demand his share in kind of the moveable and immoveable property of the succession ; nevertheless, if there be seizing or opposing creditors, or if the majority of the coheirs deem a sale necessary to discharge the liabilities of the succession, the moveable property is publicly sold in the ordinary manner.—*ff* L. 26, L. 28, *Familiæ ercisc.* ; Pothier, *Com.*, n. 700, *Société*, n. 168, *Suc.*, c. 4. art. 4 ; 2 Toullier, p. 371 ; C. N., 826. [II. 291.]

DECISION :—Dans une action en partage on doit appeler dans l'année du jugement ordonnant le partage, et la cour d'appel ne prendra pas connaissance du dit jugement, mais seulement des procédés subséquents et faits en vertu d'icelui. Dans le partage le demandeur doit avoir du défendeur compensation pour les fruits et revenus, même s'il ne les a pas demandés par son action.—Q. B. *Haggerty & Haggerty*, 8 R. L., p. 446.

698. If the immoveables cannot conveniently be divided they must be sold by licitation before the court.

Nevertheless the parties, if they be all of full age, may consent to the licitation being made before a notary upon the choice of whom they agree.—*ff* L. 20, L. 30, L. 55, *Familiæ ercisc.* ; *Cod.*, L. 3, *Communi divid.* ; Pothier, *Com.*, nn. 707, 708, 710, *Vente*, 516, *Cont. Mariage*, 586, *Soc.*, 171, *Suc.*, c. 4, art. 4 ; 7 Pand. Franç., pp. 111 et seq. ; C. N., 827. [II. 291.]

DECISION :—The court will not order a sale by licitation if partition can as advantageously be made.—K. B.—*Bédigaré vs Duhamel*, 2 R. de L., p. 441.

699. After the moveable and immoveable property have been estimated, and sold if there be cause for it, the court may send the

Digitized by Google

parties before a notary upon whom they have agreed, or who has been officially named if they do not agree in their choice.

They are to proceed, before such notary, to the account to which they are bound towards one another, to the formation of the general mass, the composition of the shares and the fixing of the compensation to be furnished to each of the copartitioners.—Pothier, *Soc.*, nn. 167, 168, 170, *Suc.*, c. 4, art. 1, § 3, p. 204, art. 4 ; *Intr. tit.* 17, *Orl.*, n. 174 ; 7 Pand. Franç., 135 et seq. ; C. N., 828. [II. 291 to 293.]

700. Each coheir returns into the mass, according to the rules hereinafter laid down, the gifts made to him and the sums in which he is indebted.—Pothier, *Suc.*, c. 4, art. 1, § 3, & art. 4 ; *Intr. tit.* 17 *Orl.*, n. 76 ; Pand. Franç., pp. 137-8 ; C. N., 829. [II. 293.]

701. If the return be not made in kind, the coheirs entitled to it pretake an equal portion from the mass of the succession.

These pretakings are made as much as possible in objects of the same nature and quality as those which are not returned in kind.—Pothier, *Suc.*, c. 4, art. 2, § 8 ; *Intr. tit.* 17, *Orl.*, n. 94 ; 4 Toullier, p. 422 ; 2 Maleville, p. 266 ; 7 Pand. Franç., 138, 139, 140 ; C. N., 830. [II. 293.]

702. After these pretakings, the parties are to proceed to the formation, out of what remains in the mass, of as many shares as there are partitioning heirs or roots.—Pothier, *Suc.*, c. 4, art. 4; 2 Maleville, 266 ; 7 Pand. Franç., 140 et seq. ; C. N., 831. [II. 293.]

703. In the formation and composition of the shares, the separation of immovaables into small parcels and the division of industrial establishments is to be avoided as much as possible ; it is also proper to put into each share, if possible, the same quantity of moveables, immoveables, rights and credits, of the same nature and value.—*ff* L. 55, *Familiæ ercisc.* ; *Cod.*, L. 7, L. 21, *Communi divid.* ; L. 2, *Communia utriusque* ; Pothier, *Com.*, n. 701, *Suc.*, c. 4 art. 4; *Intr. tit.* 17, *Orl.*, n. 97 ; 4 Toullier, p 426 ; 2 Maleville, 267 ; 7 Pand. Franç., 141 et seq.; C. N., 832. [II. 293.]

704. The inequality of shares in kind, when it is unavoidable, is to be compensated by payment of the difference either in rent or in money.—*ff* L. 55, *Familiæ ercisc.* ; *Instit., De officio judicis*, § 4 ; Pothier, *Com.*, n. 701, 5e *alinéa*, *Soc.*, n. 170, 2e *alinéa*, *Suc.*, c. 4,

Digitized by Google

art. 4, 17e *alinéa*; art. 5, § 2, alin. 1, 2, 3; *Intr. tit.* 17, *Orl.*, n. 97; 4 Toullier, p. 426; 7 Pand. Franç., 148; C. N,, 833. [II. 293.]

705. The shares are to be formed by one of the coheirs, if they can agree amongst themselves in the choice, and if he who is chosen accept the office; in the opposite case the shares are to be formed by an expert appointed by the court, and are afterwards to be drawn by lot.—Lebrun, *Suc.*, liv. 4, c. 1, n. 42; 1 Despeisses, *Société*, part. 1, sec. 4, dist. 3, n. 8; Renusson, sur Paris, tit. *des Suc.*; Pothier, *Suc.*, c. 4, art. 4, alin. 5, 19, 20; 2 Maleville, 267; 7 Pand. Franç., 154; C. N., 834. [II. 293.]

706. Before proceeding to draw, each copartitioner is allowed to propose his objections as to the formation of the shares.—4 Toullier, p. 423; 7 Pand. Fraç., 159; C. N., 835. [II. 293.]

707. The rules laid down for the division of the masses to be apportioned are also to be observed in the subdivisions of the partitioning roots. — Pothier, *Suc.*, c. 4, art. 1, § 1; 2 Delvincourt, 48; 2 Malleville, 268; 7 Pand. Franç., 159, 160; C. N., 836. [II. 293.]

708. If in the operations referred to a notary, contestations arise, he must draw up a statement of the difficulties and of the respective allegations of the parties, and submit them for the decision of the court that appointed him. These incidents are proceeded upon according to the forms prescribed by the laws of procedure.—4 Toullier, p. 422; 2 Delvincourt, 49; 7 Pand. Franç., 161; C. N., 837. [II. 295.]

709. Where licitation takes place by reason of there being amongst the heirs absentees, interdicted persons, or minors, even emancipated, it can only be effected judicially, and with the formalities prescribed for the alienation of the property of minors.—Pothier, *Suc.*, c. 4, art. 4; C. C., 300, 689, 691, 1563; 2 Delvincourt, 47; 7 Pand. Franç., 166; C. N., 460, 819, 839. [II. 295.]

710. Every person, even a relation, who is not entitled to succeed to the deceased, and to whom one of the coheirs has assigned his right in the succession, may be excluded from the partition, either by all the coheirs or by one of them, on being reimbursed the price of such assignment.—*Cod.*, L. 22, L 23, *Mandati vel contrà;*

Digitized by Google

Lebrun, *Suc.*, liv. 4, c. 2, sec. 3, n. 66; Merlin, Rép., *Droits succ.*, n. 8, 9, 9 bis, 11, 12; 2 Maleville, 271; 2 Chabot, *Suc.*, 319; 2 Bousquet, 181; 7 Pand. Franç., 170; C. N., 841. [II. 295.]

DECISIONS:—1. L'action en retrait successoral n'a point lieu quand la cession a eu pour objet une part fixe et déterminée dans un immeuble certain.—BERTHELOT, J.—*Leclerc vs Beaudry*, 10 L. C. J., p. 20.

2. Il y a lieu au retrait successoral en vertu de l'art. 710 du Code Civil du Bas-Canada même lorsque la cession a eu lieu après un partage provisoire.—Une cession par un co-héritier à un non-successible, par laquelle le cédant cède une part fixe dans des immeubles déterminés, n'est pas à l'abri du retrait, si ces immeubles déterminés composent toute la succession.—Q. B.—*Durocher & Turgeon*, 19 L. C. J, p. 178.

711. After the partition, each of the parties has a right to be put in possession of the titles belonging to the objects which have fallen to him.

The titles to a divided property remain with him who has the greatest share in it, subject to the obligation of giving the use of them when required, to the copartitioners interested therein.

The titles common to the whole inheritance are delivered to him whom the heirs have chosen to be the depositary of them; subject to the obligation of giving the use of them to the other copartitioners whenever required. If they disagree in the choice, it is made by the judge.—*ff* L. 4, L. 5, L. 6, *Familiæ ercisc.*; L. *ult.*, *De fide instrument.*; Cod., L. 5 *Com. utriusque*; Lebrun, *Suc.*, liv, 4, c. 1, nn. 44, 45; Pothier, *Suc.*, c. 2, s. 1, art. 2, § 4; 2 Maleville, 273; 7 Pand. Franç., 176; 4 Toullier, pp. 424, 430; 2 Bousquet, 183; C. N., 842. [II. 295.]

SECTION II.—OF RETURNS.

712. [Every heir, even the beneficiary heir, coming to a succession, must return to the general mass all that he has received from the deceased by gift *inter vivos*, directly or indirectly; he cannot retain the gifts made nor claim the legacies bequeathed by the deceased, unless such gifts and legacies have been given him expressly by preference and beyond his share, or with an exemption from return.]—*ff* L. 1, *De collatione bonorum*; Cod., L. 17, L. 20. *De collationibus*; Paris, 301, 302, 303, 304; Lebrun, *Suc.*, liv. 3, c. 6, s. 1; Pothier, *Suc.*, c. 3, s. 3, art. 1, § 4, c. 4, art. 2, 65; *Intr.* tit. 17, *Orl.*, nn. 56, 76, 77; Merlin, Rép., vo. *Rapport à suc.*, § 3, art. 4, n. 8, § 4, art. 2, n. 11; 7 Pand. Franç., 224; C. N., 843. [II. 297.]

Digitized by Google

DECISIONS :—1. Les donations entrevifs sont sujettes à rapport, même sous l'empire de la législation de 1774 et 1801.—Q. B.—*Tonnancour & Salvas*, 15 L. C. J., p. 113.

2. Legatees who accept, renounce thereby their rights in the succession, unless such legacies are outside of the succession.—PRIVY COUNCIL.—*Richer & Voyer*, 5 R. L, p. 591, 5 App. Cas.p. 461.

713. The heir may nevertheless, by renouncing the succession, retain the gifts or claim the legacies made to him.—Cod.. L. 17, L. 20. *De collationibus* ; L. 25, *Familiæ ercisc* ; *Novel.* 92, c. 1 ; Paris, 307 ; 3 Laurière, p. 24 ; Ord. 1731, art. 34 ; Pothier, *Suc.*, c. 4, art. 2, § 1 ; *Intr.* tit. 17, *Orl*,, no 76 ; 2 Maleville, 275 ; 7 Pand. Franç., 235 ; C. N., 845. [II. 297.]

714. [A donee who at the time of the gift was not an heir, but who at the time when the succession devolves is entitled to succeed, is bound to return the gift, unless the testator has exempted him from doing so.]—Pothier, *Suc.*, c. 4, art, 3, § 2 ; 2 Maleville, 276 ; 7 Pand. Franç., 238 ; C. N., 846. [II. 297.]

715. Gifts and legacies made to the son of a person who, at the time when the succession devolves has become entitled to succeed, are subject to be returned.

The father coming to the succession of the donor or testator is bound to return them.—*ff* L. 6, *De collationibus* ; Paris, 306 ; 3 Laurière, 23 ; Orléans, 308 ; Lebrun, *Suc.*, liv. 3, ch. 6, sec. 2, n. 45 ; Pothier, *Suc.*, c. 4, art. 2, § 4, art. 3, § 2 ; 1 Argou, 490 ; Lamoignon, *Arrêtés*, tit. 44, art. 4 ; Pocquet, 490 ; Pand. Franç., 240-1 ; 2 Maleville, sur art. 847 ; C. N., 847. [II. 297.]

716. A grandson coming to the succession of his grand-father is bound to return what has been given to his father, although he should renounce the succession of the latter.—*Cod.* L. 19, *De collationibus* ; Paris 308 ; Lebrun, liv. 3, c. 6, sec. 2, n. 46 ; Pocquet, règle 12, p. 268 ; 1 Argou, 491 ; Lamoignon, tit. 44, art. 7, *contrà* ; C. N., 848. [II. 297.]

717. The obligation to return the gifts and legacies made during the marriage, either to the consort who is entitled to succeed, or to the other consort alone, or to both, depends upon the interest of the heir who is capable of succeeding and the advantage he derives therefrom, according to the rules laid down in the title concerning marriage covenants, as to the effect of gifts and legacies made to the consorts

Digitized by Google

during marriage.—Pothier, *Suc.*, c. 4, art. 2, § 4, *alin.* 6-13, art. 3, § 2, *alin.* 24; Merlin, Rép., vo *Rapport à suc.*, § 6, n. 4; 7 Pand. Franç., 248 et seq.; 2 Maleville, 278; C. N., 849. [II. 297.]

718. Return is only made to the succession of the donor or testator.—Lebrun, part. 2, p. 130; Pothier, *Suc.*, c. 4, art. 2, § 4, *alin.* 6-13; *Intr. tit.* 17, *Orl.*, n. 84; 2 Maleville, 279; 7 Pand. Franç. 254; C. N., 850. [II. 297.]

719. Whatever has been laid out for the establishment of one of the coheirs, or for the payment of his debts must be returned.—*Cod.*, L. 20, *De collationibus*; Bartol, *Ad leg.* 1, § 15, *De collat.* nn. 4-6; Loyseau, *Offices*, c. 6, nn. 25, 26, 56, 58; Lacombe, vo. *Rapport*, sec. 3, n. 10; Pothier, *Suc.*, p. 180; Lamoignon, tit. 44, art. 13, 14, 15, 16, 17; 2 Maleville, 279; 7 Pand. Franç., 256 et seq; 4 *Conf. du Code*, 88; Chaudon, *Observ. Collations*, 213; C. N., 851. [II. 299].

720. The expenses of nourishment, maintenance, education and apprenticeship, the ordinary expenses of equipment, of weddings, and customary presents are not subject to be returned.—*ff* L. 1, §§ 15, 16, *De collat.*; L. 20, § 6, L. 50, *Familiæ ercisc.*; Lacombe, vo. *Rapport*, sec. 3; Pothier, *Suc.*, c. 4, pp. 180 et seq.; Lamoignon, tit. 44, art. 17; C. N. 852. [II. 299.]

DECISION:—Que le père est tenu en loi à l'entretien et à l'éducation de son enfant, et que ni lui, ni ses représentants ne peuvent opposer les dépenses faites pour ces objets, en compensation à une dette légitimement due à l'enfant. (C. C. 165.)—TASCHEREAU, J.—*Boileau vs Seers*, M. L. R., 1 S. C., p. 239.

See also decisions noted at C. C. 165.

721. The same rule applies to the profits which the heir may have derived from agreements made with the deceased, if at the time at which they are made they do not confer an indirect advantage.—*ff* L. 36, L. 38, *De cont. empt.*; Cod., L. 3, L. 9, *De cont. empt.*; Pothier, *Suc.*, 180 et seq.; Chopin, sur Anjou, liv. 3, c. 1, tit. 4, n. 5; 2 Maleville, 281 et seq.; 7 Pand. Franç. 270, 275; C. N., 853. [II. 299.]

722. The profits and interest of the things subject to be returned are due only from the day when the succession devolves.—*ff* L. 5, *De dotis collat.*; Cod., L. 20, *De collat.*; Paris, 309; Pothier, *Suc.*, c. 4, art. 2, § 3; Pocquet, *Règle* 15, p. 227; Lamoignon, tit. 44, art. 29; Merlin, vo. *Rapport*, § 4, art. 2, n. 18; C. N., 856. [II. 299.]

Digitized by Google

723. Returns are due only from coheir to coheir; they are not due to the legatees nor to the creditors of the succession.—*ff* L. 1, *De Collat.*; Pothier, *Suc.*, c. 4, art. 2, § 6; *Intr.* tit. 17, *Orl.*, n. 88; Pocquet, *Règle* 9, p. 225; 7 Pand. Franç., sur art. 857, p. 301; C. N., 857. [II. 299.]

724. Returns are effected either in kind or by taking less.—Paris, 304, 305; 3 Laurière, pp. 20, 21, *Règle* 16; Pocquet, *Règle* 10, p. 226; C. N., 858. [II. 299].

725. The return of moveable property is only made by taking less; it cannot be returned in kind.—Lebrun, *Suc.*, liv. 3, c. 6, sec. 3; Ferrière, sur Paris, art. 306; Duplessis, sur Paris, liv. 3, c. 6, sec. 3; Pothier, *Suc.*, c. 4, art. 2, § 7; *Intr.* tit. 17, *Orl.*, n. 90; Basnage, sur Normandie, arrêt 9 déc. 1653; 2 Maleville, 290; 4 Conf. du Code, pp. 101 et seq.; 7 Pand. Franç., 290; C. N., 868. [II. 299.]

726. The return of money received is also made by taking less in the money of the succession. In case of insufficiency the donee or legatee may dispense with the return of money, by abandoning a proportionate value in the moveable property, or in default of moveable property, in the immoveables of the succession.—Ferrière, sur Paris, art. 305; Pothier, *Obl.*; Lacombe, 554; 7 Pand. Franç., 294, n. 476; 2 Chabot, 550; C. N., 869. [II. 299.]

727. An immoveable given or bequeathed, which has perished by a fortuitous event, and without the fault of the donee or legatee, is not subject to be returned.—*ff* L. 2, § 2, *De collat.*; L. 40, *De cond. indeb.*; L. 58, *De legatis*; Lacombe, 555; Pothier, *Suc.*, c. 4, art. 2, § 7; *Intr.* tit. 17, *Orl.* n. 91; Lebrun, *Suc.*, liv. 3, c. 6, sec. 3, n. 40; 2 Maleville, 283; 7 Pand. Franç., 276; C. N., 855. [II. 299.]

728. [As to immoveables, the donee or legatee may at his option return them in all cases, either in kind or by taking less according to valuation.]—Paris, 305; Orléans, 306; 3 Laurière, pp. 20, 21; Pothier, *Suc.*, c. 4, *a.* 2, § 7, 8; *Int.*, *tit.* 17, Orl., n. 194; Lacombe, 554; C. N., 858, 859, 860.]II. 301.]

729. If the immoveable be returned in kind, the donee or legatee has a right to be reimbursed the expenditures made upon it; those which were necessary, conformably to the rules established by article 417, and those which were unnecessary, according to article

Digitized by Google

582.—C. C. 417, 582; Pothier, *Mariage*, n. 577 *Suc.*, c. 4, art. 2, § 7; *Intr.* tit. 17, *Orl.*, nn. 92, 97; Orléans, 306; Lacombe, 555; C. N., 861, 862. [II. 301.]

730. The donee or legatee must, on the other hand, account for injuries and deteriorations which have diminished the value of the immoveable returned in kind, if they result from his own act or from that of his representatives.

This rule does not apply if they have been caused by a fortuitous event, and without his or their participation.—Pothier, *Mariage*, n. 576, *Suc.*, c. 4, art. 2, § 7; *Intr.* tit. 15, *Orl.*, n. 78; tit. 17, n. 91; Lacombe, 555; C. N., 863. [II. 301.]

731. [When the return is made in kind, if the immoveable returned be hypothecated or encumbered, the copartitioners may require the donee or legatee to discharge it from such hypothec or incumbrance; if he fail to do so, he can only return by taking less.

The parties may however agree that the return shall be made in kind; this is effected without prejudice to the claims of the hypothecary creditors, which are charged in the partition of the succession to the party making the return.]—Lebrun, *Suc.*, liv. 3, c. 6, s. 4; Pothier, *Suc.*, c. 4, art. 2, § 6, al. 1, 2; *Intr. tit.* 17, *Orl.* n. 92; Lacombe, 556; 2 Maleville, 288; 7 Pand. Franç., 306; 4 Conf. du Code, 96; C. N., 865. [II. 301.]

732. The coheir who returns an immoveable in kind may retain possession of it until he is effectively reimbursed the sums due to him for disbursements and ameliorations.—Pothier, *Suc.*, c. 4, art. 3, § 7; Ord. 1667, tit. 27, art. 9; 1 Rogron, p. 811; C. N., 867. [II. 301].

733. The immoveables remaining in the succession are estimated according to their condition and value at the time of the partition.

Those which are subject to return, or which have been returned in kind, whether they have been given or bequeathed, are to be estimated according to their value at the time of the partition, according to the condition in which they were at the time of the gift, or, as to legacies, at the time when the succession devolved; regard being had to the provisions contained in the preceding articles.—Pothier, *Suc.*, c. 4, art. 2, sec. 7; *Intr. tit.* 17, *Orl.*, n. 95; Lacombe, 555; C. N., 860, 861. [II. 301 to 303.]

734. The moveable things found in the succession, and those which are returned as being legacies, are likewise estimated according to their condition and value at the time of the partition, and those

Digitized by Google

which are returned as having been given, according to their condition and value at the time of the gift.—Pothier, *Suc.*, c. 4, art. 2, § 7; *Intr. tit.* 17, *Orl.*, n. 90; Lacombe, 555; 4 Conf. du Code, 101; 2 Maleville, 290; 7 Pand. Franç., p. 290; C. N., 868. [II. 303.]

SECTION III.—OF PAYMENT OF DEBTS.

735. An heir who comes alone to the succession is bound to discharge all the debts and liabilities.

The same rule applies to a universal legatee.

A legatee by general title is held to contribute in proportion to his share in the succession.

A particular legatee is bound only in case of the insufficiency of the other property, and is also subject to hypothecary claims against the property bequeathed; saving his recourse against those who are held personally.—*Cod.*, L. 2, L. 7, *De hæredit. et action.*; L. 1, L. 2, *Si unus ex pluribus*; Paris, 332, 333, 334; Orléans, 360; 3 Laurière, 141 et seq.; Pothier, *Suc.*, c. 5, art. 2, alin. 1; *Intr. tit.* 17, *Orl.*, nn. 108, 126; *Don. test.*, c. 2, sec. 1, § 2; Dard, sur art. 870, p. 194; C. N., 870, 871. [II. 303.]

DECISIONS:—1. An action against a *légataire universel* is good without an averment that he is a sole *légataire*. It is the business of the defendant, if there be another, to plead the fact.—K. B.—*Gagnon vs Pagé*, 1 R. de L., p. 348.

2. Un légataire universel ne peut se soustraire au paiement des legs particuliers sous prétexte que les meubles sont insuffisants, s'il n'a rendu compte des biens de la succession, ou fait offre de les abandonner; et il doit y être condamné individuellement et en son propre nom.—Smith & Vanfelson, JJ.—*Lenoir vs Hamelin*, 3 L. C. R., p. 133.

3. Le créancier d'un testateur qui a discuté les biens de la succession, sans avoir été payé, peut poursuivre un légataire particulier d'un immeuble, pour qu'il soit tenu de le rapporter et de le délaisser en justice, si mieux il n'aime payer la créance du demandeur.—En ce cas le défendeur qui a fait des impenses pour lesquelles il a une créance privilégiée sur l'immeuble dont on lui demande le délaissement, n'a pas le droit de retenir l'immeuble jusqu'à ce qu'il ait été payé de ses impenses, mais il peut exercer sa créance privilégiée sur le prix de l'immeuble qui devra être vendu sur un curateur au délaissement, dans le cas où le défendeur ne se prévaudrait pas de l'option qui lui est offerte de payer la créance du demandeur.—Q. B.—*Matte & Laroche*, 8 R. L., p. 517.

4. In an action for the recovery of a legacy, the heirs may be joined with the testamentary executors as defendants. Loranger, J.—*Royal Institution for the Advancement of Learning vs Scott.* 5 L. N., p. 375.

5. Universal legatees, who accept a succession, purely and simply, may be sued for a debt of the testator, notwithstanding that the testator may have named executors in whose hands the estate still is at the time the action is instituted.—Q. B.—*Pierce & Butters*, 24 L. C. J., p. 167.

Digitized by Google

6. Les légataires universels qui acceptent purement et simplement le legs, sont tenus des dettes du testateur et peuvent être poursuivis pour icelles, quoique le testateur ait nommé des exécuteurs testamentaires et administrateurs.—Q. B. —*Rolland & Beaudry*, 23 L. C. J., p. 255.—RAINVILLE, J.—22 L. C. J., p. 72.

7. Qu'une partie condamnée comme légataire universelle ou donataire universelle en usufruit, est en vertu de tel jugement, débitrice personnelle du jugement.—Q. B. —*Trudel & Hudon*, 24 L. C. J., p. 171.

8. Notwithstanding that the beneficiary heir is, under C. C. 672, charged with the administration of the estate, nevertheless, he may be sued directly and the property of the succession attached by any creditor having an executory title.—JETTÉ, J.—*Corse vs Drummond*, 24 L. C. J., p. 254.

9. Que tous les biens d'une succession ne sont pas le gage des créanciers de préférence aux légataires particuliers, de manière à ce qu'ils puissent empêcher ces derniers à prendre possession de leurs legs ; s'il doit y avoir réduction des legs particuliers pour payer les dettes du testateur, les créanciers ont une action contre les légataires à ce titre pour obtenir cette réduction, mais ils ne peuvent faire mettre au nom d'un curateur nommé à la succession insolvable, tous les biens du testateur.—C. R.—*Banque Ville Marie vs Rocher*, M. L. R., 1 S. C., p. 409.

736. If there be several heirs or several universal legatees, they contribute to the payment of the debts and charges, each in proportion to his share in the succession.—See authorities under preceding article ; C. N., 870, 871. [II. 303.]

DECISIONS :—1. Suit is brought against nine heirs for a debt due by their father, and the questions at present raised upon law issues are: 1. As to the sufficiency of the allegation of the declaration, it not being asserted that the heirs had accepted the succession; and, 2. As to the correctness of bringing the action against the heirs jointly. *Held*, 1. That it is the duty of the heirs to show non-acceptance, and therefore that it need not be specially alleged in the declaration; acceptation is the general rule; 2. That the suit against the heirs jointly is conformable to the practice of the court.—MACKAY, J.—*Grange vs McDonald*, 2 R. C. p. 478.

2. The heirs at law are liable each for his share only of the pew rent due by, and the charges for interring their parents.—BADGLEY, J. *Fabrique de Montreal vs Brault*, 1 L. C. L. J., p. 66.

737. A legatee under general title, who takes concurrently with the heirs, contributes to the debts and charges in the same proportion.—Paris, 334 ; Pothier, *Suc.*, c. 5, art. 2, *Don. test.*, c. 2, s. 1, § 2 ; C. N., 871. [II. 303.]

738. The obligation resulting from the preceding articles is personal to the heir and universal legatees, or legatees under general title ; it gives a direct action, against each of them respectively, to the particular legatees and to the creditors of the succession.—*ff* L. 80, *De pignor. actione ;* Cod., L. 2, L. 7, *De hæredit. action. ;* Pothier, *Suc.*, c. 5, art. 3, § 1, *Don, test.*, c. 5 s 3, art. 2 ; C. N., 873. [II. 303.]

Digitized by Google

739. In addition to the personal action, the heir and universal legatee, or legatee under general title, are held hypothecarily for whatever claims affect the immoveables included in their share; saving their recourse against those who are personally liable, for their share, according to the rules applicable to warranty.—Paris, 333; 3 Laurière, 144; Pothier, *Hyp.*, c. 2, s. 2; *Intr. aux Cout.*, tit. 16, n. 420; C. N., 871, 873. [II. 303.]

740. An heir or universal legatee, or a legatee under general title, who, not being personally bound, pays the hypothecary debts charged upon the immoveable included in his share, becomes subrogated in all the rights of the creditor against the other coheirs or co-legatees for their share; conventional subrogation cannot in such a case have a greater effect; saving the rights of the beneficiary heir as creditor.—Cod., L. 22, *De jure deliber*; Paris, 333; 3 Laurière, 144; Pothier, *Suc.*, c. 5, art. 4, alin. 9, 10; 2 Maleville, 296; 7 Pand, Franç., 351-2; 2 Demante, sur art. 875; C. N., 875. [II. 303.]

741. A particular legatee who pays an hypothecary debt for which he is not liable in order to free the immoveable bequeathed to him, has his recourse against those who take the succession, each for his share, with subrogation in the same manner as any other person acquiring under particular title.—*ff* L. 57, *De legatis*; Pothier, *Suc.* c. 5, art. 4, n. 2; *Don. test.*, s. 3, § 3, n. 6; 2 Maleville, 295; 7 Pand. Franç., 347 et seq.; C. N., 874. [II. 305.]

742. In the event of heirs or legatees exercising their recourse against their coheirs or legatees, by reason of an hypothecary debt, the liability of such as are insolvent is divided rateably among all the others, in proportion to their respective shares.—*ff* L. 36, L. 39, *De defijus. et mand.*; L. 76, *De solution*; 2 Maleville, 296; 7 Pand. Franç., 353; 4 Toullier, p. 541; C. N., 876. [II. 305.]

743. The creditors of the deceased and his legatees have a right to a separation of the property of the succession from that of the heirs and universal legatees, or legatees under general title, unless there is novation. This right may be exercised as long as the property exists in the hands of the latter or upon the price of the sale, if it be yet unpaid.—*ff* L. 1, *De separat.*; *Cod.*, L, 2, *De bonis auctorit. jud.*; Pothier, *Suc.*, c. 5, art. 5, alin. 4, 18, 22, 24, 32; *Intr. tit.* 17, *Ord.*, n. 127; Merlin, Rép., vo. *Séparation de patrim.*, § 5, n. 6; 2 Maleville,

Digitized by Google

297-8; 7 Pand. Franç., 357 to 358 and especially 361; C. N., 878, 879, 880. [II. 305.]

DECISIONS:—1. Le droit de séparation de patrimoine, dans le cas d'un seul immeuble légué, se trouve compris dans la demande en remise de ce seul immeuble.—Q. B.—*Matte & Laroche*, 4 Q. L. R., p. 65.

2. Qu'aux termes de l'article 743 C. C., le droit à la séparation des patrimoines constitue un privilége, et peut être exercé sur les biens existant dans les mains des héritiers ou légataires universels, et même, sur le prix d'aliénation, s'il en est encore dû, et qu'aucune demande judiciaire, soit principale, soit incidente, n'est nécessaire pour donner droit aux créanciers à cette séparation, leur privilège pouvant être exercé sur la distribution des deniers provenant de la succession du défunt, sans aucune action, mais simplement par opposition. (See C. C. 1983 & 1990.)—RAINVILLE, J.—*Bachand vs Bisson*, 12 R. L., p. 11.

3. Que les créanciers d'un défunt ont toujours le droit de demander la séparation du patrimoine de leur débiteur décédé, tant que ce patrimoine n'a pas été confondu avec celui des héritiers ou représentants légaux du défunt. (See C. C. 879 & 2106.)—Q. B.—*Banque Ville Marie & Viger*, 30 L. C. J., p. 143.

4. Que les créanciers d'un débiteur décédé, ayant le droit de demander la séparation des biens composant le patrimoine du défunt, tant que ce patrimoine n'a pas été confondu avec celui de ses héritiers ou représentants légaux, les légataires particuliers ne peuvent obtenir la disposition immédiate de leurs legs, lorsque les créanciers ont demandé cette séparation de patrimoine, qu'en désintéressant les créanciers ou en leur donnant suffisante caution qu'ils seront intégralement payés de leurs créances. (C. C. 880.)—Q. B.—*Viger & Robitaille*, 4 Q. B. R., p. 372.

744. The creditors of the heir or legatees are not allowed to claim this separation of property, nor to exercise any right of preference, against the creditors of the succession.—*ff* L. 1, § 2, *De separation*; Lebrun, *Suc.*, liv. 4, c. 2, sec. 1; Pothier, *Suc.*, c. 5, art. 4, alin. 32, 34; *Intr. tit.* 17, *Orl.*, n. 130; 2 Maleville, 298; Pand. Franç., 366-7; 2 Chabot, 647; C. N., 881. [II. 305.]

745. The creditors of the succession and those of the copartitioners have a right to be present at the partition if they require it.

If the partition be made in fraud of their rights, they may attack it in the same manner as any other act made to their detriment.—Louet & Brodeur, *Lettre R.*, nn. 20, 21; Lebrun, *Suc.*, liv. 3, c. 8, sec. 2, nn. 23, 28; C. N., 865, 882. [II. 305.]

SECTION IV.—OF THE EFFECTS OF PARTITION AND OF THE WARRANTY OF SHARES.

746. Each copartitioner is deemed to have inherited alone and directly all the things comprised in his share, or which he has obtained

Digitized by Google

by licitation, and to have never had the ownership of the other property of the succession.—*ff* L. 20, L. 44, *Familiæ ercisc.; Cod.*, L. 1, *Communia utriusque* ; Pothier, *Obl*, n. 445, *Com.*, nn. 140, 711, 713 ; *Vente*, n. 631, *Société*, n. 179, *Suc.*, c. 4, art. 5, § 1 ; 2 Maleville, 330 ; C. N., 883. [II. 305].

DECISION :—Que dans l'espèce il n'y a pas lieu à l'application des articles 746 et 1898 C. C., attendu qu'il s'agit d'une société commerciale et que le partage des biens de la dite société ne réagit que jusqu'au jour de sa dissolution ; que comme matière de fait la société plaidée par le défendeur n'était pas dissoute lors du partage.—LORANGER, J.—*Girard vs Rousseau*, M. L. R., 3 S. C., p. 293.

Memo : As to the necessity of notifying a debtor, before taking suit against him, of the fact of the particular credit having fallen to the particular creditor sueing, see cases noted at C. C. 1571 & the remarks of DORION, C. J. at 3 Q. B. R., p. 135.

747. Every act having for its object to put an end to indivision amongst coheirs and legatees is deemed to be a partition, although it should purport to be a sale, an exchange, a transaction, or have received any other name.—*Cod.*, L. 20, *De transaction* ; Ord. d'avril 1560 ; 2 *Arrêts de Boniface*, liv. 3, tit. 13, c. 3 ; Papon, liv. 35, tit. 7, art. 7 ; Pothier, *Société*, n. 174, *Suc.*, c. 5, art. 6, p. 216 ; De L'Hommeau, L. 3, maxime 3 ; Merlin, Rép., vo. *Transaction*, § 5, n. 13 ; C. N., 888. [II. 305.]

DECISIONS :—1. L'autorisation donnée par le protonotaire de vendre la part des mineurs dans une propriété, avec l'ordre à tous les copropriétaires d'accéder à telle vente, et l'adjudication faite de tel immeuble conformément à cette autorisation, équivaut à la licitation et partage, et doit avoir tous les effets d'un partage vis-à-vis des créanciers de chaque cohéritier qui a pu hypothéquer quelque partie indivise du dit immeuble. L'accession de tous les copropriétaires à telle vente, conformément à l'ordre du protonotaire, fait présumer chez ceux-ci l'intention de faire cesser l'indivision et de procéder au partage.—CHAGNON, J.—*Monette & Molleur*, 6 R. L., p. 561.

2. Que dans le cas où un père possède par indivis avec ses enfants des immeubles dont il est propriétaire pour moitié et les enfants pour l'autre moitié, comme représentant leur mère, la licitation volontaire, autorisée par justice en ce qui regarde les mineurs, est un véritable partage et en a tous les effets.—MATHIEU, J.—*Dufort vs Chicoine*, 31 L. C. J , p. 112, M. L. R, 3 S. C., p. 211.

748. The compartitioners are respectively warrantors towards each other for all disturbances or evictions proceeding from a cause anterior to the partition.

Such warranty does not take place if the kind of eviction suffered have been excepted by some provision of the act of partition ; it ceases if the party suffer eviction through his own fault.—*ff* L. 20, L.

Digitized by Google

25, L. 33, *Familiæ ercisc ; Cod.*, L. 14, *eod. tit.*; L. 77, *De eviction* ; Loyseau, *Garanties des rentes*, c. 3, no 3 ; Pothier, *Vente*, no 633, *Société* n. 178, *Com.*, nn. 716-7-8, 723-4 ; *Intr. tit.* 17, *Orl.*, nn. 98-9 ; *Suc.*. c. 4, art. 5, § 3 ; 2 Maleville. 300-1-2 ; C. N., 884. [II. 305 to 307.]

DECISION :—With respect to liability of co-partners towards each other for eviction in cases where, the partnership being dissolved, the assets have been allotted between them. See case noted at C. C. 1507.—PRIVY COUNCIL.—*Prentice & McDougall*, 8 L. N., p. 163.—Q. B.—4 Q. B. R., p. 91, 7 L. N., p. 162. (Not reported in App. Cas.)

749. Each of the copartitioners is personally bound, in proportion to his share, to indemnify his coheir for the loss caused to him by the eviction.

If one of the copartitioners be insolvent, the portion for which he is liable must be divided rateably among all the solvent coheirs, according to their respective shares.—*Cod.*, L. 1, L. 2, *Si unus ex pluribus* ; Pothier, *Com.*, n. 170, alin. 1, *Vente*, n. 635, *Intr, tit.* 17, *Orl.*, nn. 98, 100, *Suc.*, c. 4. art. 5, § 3, alin. 22, 23, 29 ; 2 Maleville, 302 ; C. N., 885. [II. 307.]

DECISION :—The amount of the indemnity is the value of the property at the date of the *partage*, not that of the date of the eviction.—PRIVY COUNCIL.—*Prentice & McDougall*, 8 L. N., p. 163.—Q. B.—4 Q. B. R., p. 91, 7 L. N., p. 162. (Not reported in App. Cas.)

750. There is no warranty against the insolvency of the debtor of a claim which has fallen to one of the coheirs, if such insolvency do not occur until after the partition.

Nevertheless, there is an action of warranty in the case of a rent, when the debtor of it has become insolvent at any time since the partition ; unless the loss arises from the fault of the party to whom the rent was allotted.

The insolvency of debtors which exists at the time of the partition gives rise to warranty in the same manner as eviction.—*ff* L. 74, *De eviction* ; L. 4, *De hæreditate vel actione venditâ* ; Lebrun, *Suc.*, liv. 4, c. 1, n. 66 ; Pothier, *Com.*, n. 723, alin. 3, 5, 12 ; *Vente*, n. 634 ; *Suc.*, c. 4, art. 5, § 3, alin. 25, 28, 29 ; Lacombe, vo. *Partage*, sec. 4, n. 2 ; 7 Pand. Franç., 374 ; 2 Maleville, 303 ; C. N., 886. [II. 307.]

SECTION V.—OF RESCISSION IN MATTERS OF PARTITION.

751. Partitions may be rescinded for the same causes as other contracts.

[Rescission on the ground of lesion takes place in the case of minors only, according to the rules declared in the title *Of obligations*.]

Digitized by Google

The mere omission of an object belonging to the succession does not give rise to the action of rescission, but only gives a right to a supplement of the act of partition. —Cod. L. 1, *Quad metûs causâ;* Pothier, *Obl.*, n. 35, *Vente*, n. 636, *Société*, n. 174, *Com.* n. 715, *Suc.*, c. 4, art. 6, alin. 1, 2; Merlin, *Rép.*, vo. *Décision*, § 6; 2 Maleville, 303-4-5; C. C., 1001 to 1011; C. N., 887, 889. [II. 307.]

DECISION:—Que l'acte de partage fait en 1858 entre cinq légataires et où l'opposante (une des filles du testateur) alors mineure, y était représentée par son tuteur, ne peuvent plus être attaqué par celle-ci si elle l'a ratifié en s'y conformant plus de trente ans après être devenue majeure.—C. R.—*Fraser vs Pouliot*, 13 Q. L. R., p. 370.

752. When it becomes necessary to decide whether there is lesion, the value of the objects at the time of the partition is to be considered.—Cod., L. 8, *De rescindendâ venditione;* Lebrun, *Suc.*, liv. 4, c. 1, n. 59; C. N., 890. [II. 307.]

753. The defendant in an action of rescission of partition may arrest its progress and prevent the bringing of another, by offering and delivering to the plaintiff the supplement of his share in the succession, either in money or in kind.—Cod., L. 2, *De rescind. vendit.;* Lebrun, *Suc.*, liv. 4, c. 1, n. 62, n. 61; Dumoulin, sur Paris, art. 33, glose 1, n. 42; Pothier, *Suc.*, c. 4, art. 6; 2 Maleville, 307; 7 Pand. Franç., 378; C. N., 891. [II. 309.]

TITLE SECOND.

OF GIFTS *INTER VIVOS* AND BY WILL.

CHAPTER FIRST.

GENERAL PROVISIONS.

754. A person cannot dispose of his property by gratuitous title, otherwise than by gift *inter vivos* or by will.—*ff* L. 1, *De donationibus;* 1 Ricard, *Don.*, part. 1, n. 43; Pothier, *Don.*, p. 437, *art. prélim.;* 1 Journal des Aud., 238; 7 Nouv. Deniz., p. 2; C. N., 893. [II. 309.]

Digitized by Google

755. Gift *inter vivos* is an act by which the donor divests himself, by gratuitous title, of the ownership of a thing, in favor of the donee, whose acceptance is requisite and renders the contract perfect. This acceptance makes it irrevocable, saving the cases provided for by law, or a valid resolutive condition.—Pothier, *Ib.; ff* L. 1; L. 9 L. 19, § 2, *De donat.;* L. 69, *De reg. juris.*; 1 Ricard, part. 1, n. 16; 2 Bourjon, 77, 105, 119; 2 Lamoignon, 351; Guyot, *Don.*, 164, 173; 7 N. Den., 8, 49; C. N., 894. [II. 309.]

756. A will is an act of gift in contemplation of death, by means of which the testator, without the intervention of the person benefited, makes a free disposal of the whole or of a part of his property, to take effect only after his death, with power at all times to revoke it. Any acceptance of it purporting to be made in his lifetime is of no effect.—*ff* L. 1, *De mortis causâ donat.;* L. 1, *Qui testam.*; 1 Ricard, part. 1, nn. 37, 41, 82; Domat, *Test.*, tit. 1, s. 1, n. 4; Guyot, *Don.*, 164, *Test.*, 99; 7 Nouv. Deniz., 6, 7; C. N., 895. [II. 309.]

757. Certain gifts may be made irrevocably *inter vivos* in a contract of marriage, to take effect, however, only after death. They partake of gifts *inter vivos* and of wills, and are treated of specially in the sixth section of the second chapter of this title.—*Ord. des donations*, art. 15; C. N., 897. [II. 309.]

DECISIONS:—Que la donation universelle en usufruit faite par contrat de mariage, est une donation *causa mortis*.—Q. B.—*Hudon & Painchaud*, 24 L. C. J., p. 268.

2. Que le don mutuel d'usufruit n'est pas une donation proprement dite, mais constitue une simple convention de mariage, contenant avantage réciproque en faveur des parties, et qui, comme telle, échappe à la nécessité de l'enrégistrement.—C. R.—*Marchessault vs Durand*, 16 R. L., p. 193.

758. Every gift made so as to take effect only after death, which is not valid as a will, or as permitted in a contract of marriage, is void.—1 Ricard, part. 1, n. 43; Guyot, *Don.*, 212, *Ord. des Donations*, art., 15; Pothier, *Don.*, 442; 2 Lamoignon, 350; C.N., 943, 947. [II. 309.]

759. The prohibitions and restrictions as to the capacity for contracting, alienating or acquiring, established elsewhere in this code, apply to gifts *inter vivos* and to wills, with the modifications contained in the present title. [II. 309.]

760. Gifts *inter vivos* or by will may be conditional.

An impossible condition, or one contrary to good morals, to law, or to public order, upon which a gift *inter vivos* depends, is void, and renders void the disposition itself, as in other contracts.

Digitized by Google

In a will such a condition is considered as not written, and does not annul the disposition.—*ff* L. 7, *De pactis dotatibus;* L. 15, § 1, *Ad leg. falcid.;* L. 1, *De condictione ob turpem;* L. 3, *De condit. et demonst.*; *Cod.* L. 1, L. 2, L. 3, *De donat. quæ sub modo;* 1 Ricard, part. 1, n. 1044; Domat, *Test.* tit. 1, s. 8, nn. 1, 18; Guyot, *Don.*, 173, 198; 5 N. Den., 113-4-5; 7 do, 9; Troplong, *Don,* nn. 212 et seq.; Pothier, *Obl.*, n. 204, *Test.* p. 329; C. C., 1080; C. N., 900, 1172. [II. 311.]

DECISIONS:—1. The 760th and 831st article of the Civil Code of Canada must be read together; and by virtue of their provision all conditions in a will, unless according to the plain meaning and intention of the testator they be contrary to law, public order or good morals, are effective, and cannot be regarded as minatory only, or dependent for their application upon the discretion of the court. Such discretion is not conferred upon the courts by the code, and though exercised by the old french parliaments, has been since authoritatively condemned and repudiated. Such a condition as that contained in the said penal clause can only, in practice, be applied where a will has been unsuccessfully contested, and would therefore, be ineffective to protect an illegal disposition or to render operative an invalid testament. It is not against public order for a testator to protect his estate and representative against unsuccessful attemps to illigate his will.—PRIVY COUNCIL.—*Evanturel & Evanturel*, 20 L. C. J., p. 218, 1 Q. L. R., p. 74, 6 P. C. App. p. 1. —Q. B.—16 L. C. J., p. 258.

2. Que des biens légués comme aliments, avec clause d'insaisissabilité, peuvent être saisis par un créancier d'une dette alimentaire, c'est-à-dire, pour effets d'épiceries vendus et livrés au légataire.—TASCHEREAU, J.—*Prescott vs Thibault*, M. L. R., 1 S. C., p. 187.

3. Que la condition insérée dans un acte de donation fait en 1864, comportant substitution, que cette substitution ne pourra être recueillie que par celui ou ceux qui professeront une religion déterminée (la religion protestante) est nulle et doit être considérée comme non écrite, mais n'annule pas la disposition.—MATHIEU, J.—*Kingston vs Canadian Pacific Ry.*, 16 R. L. p. 361.

CHAPTER SECOND.

OF GIFTS *INTER VIVOS.*

SECTION I.—OF THE CAPACITY TO GIVE AND TO RECEIVE BY GIFT *INTER VIVOS.*

761. All persons capable of disposing freely of their property, may do so by gift *inter vivos*, save the exceptions established by law.—Paris, 272; Pothier, *Don.*, p. 438; 1 Ricard, part. 1, n. 126; Guyot, *Don.*, 169; 7 N. Den., 23; Troplong, *Don.*, n. 509; 5 Toullier, n. 52; C. N. 902; Thev. d'Ess. (Can. Ed.) p. 29. [II. 311.]

Digitized by Google

DECISION :—1. Qu'en l'absence d'une règle contraire dans la loi qui crée une compagnie incorporée, dans les règlements qu'elle autorise, ou dans un statut spécial qui l'affecte, la donation d'actions dans ses fonds n'est, pour valoir contre les tiers, soumise à aucune autre formalité que la donation de meubles corporels.—C. R.—*Whitehead vs McLaughlin*, 8 Q. L. R., p. 373.

762. Gifts purporting to be *inter vivos* are void, as presumed to be made in contemplation of death, when they are made during the supposed mortal illness of the donor, whether it be followed or not by his death, unless circumstances tend to render them valid.

If the donor recover, and leave the donee in peaceable possession for a considerable time, the nullity is covered.—Paris, 277; 1 Ricard, part. 1, nn. 87 et seq.; 2 Bourjon, *Don.*, tit. 4, c. 2, nn. 1, 2, 3; Pothier, *Don.*, p. 439; 7 N. Den., 25 et seq.; Thev. d'Ess. (Can. Ed.) *loc. cit.* [II. 311.]

DECISION :—Une donation entrevifs, faite avec toutes les formalités d'un tel acte, quelques jours avant la mort du donateur, lorsque la cause déterminante de la mort ne s'est déclarée que depuis la donation, est valide, ne peut pas être considérée comme une donation à cause de mort et doit être maintenue.—LORANGER, J.—*Raiche vs Alie*, 1 R. L., p. 77.

763. Minors cannot give *inter vivos*, even with the assistance of their tutors, unless it be by their contract of marriage, as provided in the title *Of Obligations*.

Emancipated minors may nevertheless give moveable articles, according to their condition and means, and provided they do not materially affect their capital.

Tutors, curators and other administrators cannot give the property entrusted to them, except things of moderate value, in the interest of their charge.

The necessity of a wife being authorized by her husband applies to gifts *inter vivos*, whether for giving or for receiving.

Public corporations, even those having power to alienate, besides the special provisions and formalities which concern them, cannot give gratuitously without the sanction of the authorities to whom they are subject and of the main body of corporators; those who administer generally for corporations may nevertheless give alone, within the limits above defined as to tutors and curators.

Private corporations may give *inter vivos* in the same manner as individuals, with the consent of the main body of corporators.—Paris, 272; Pothier, *Personnes*, 615, *Don.*, 438, 439; Guyot, *Don.*, 169, 170; Bourjon, *Don.*, tit. 1, c. 5, n. 8; 7 N. Den., 23; Troplong,

Digitized by Google

Don., nn. 586 et seq., 593 ; C. N., 903, 904, 1095 ; Thev. d'Ess., (Can. Ed.) loc. cit. [II. 311.]

764. [The prohibitions and restrictions respecting gifts and benefits bestowed by future consorts in case of second marriages no longer exist.]—[II. 313].

765. All persons capable of succeeding and of acquiring may receive by gift *inter vivos*, saving any exception established by law, and subject to the necesssity of legal acceptance by the donee, or by a person qualified to accept for him.—Pothier, *Don.*, 438, 445, 456; Guyot, *Don.*, 169 ; 7 N. Den., 33; Troplong, *Don.*, vo. 509; C. N., 902 ; Thev. d'Ess. (Can. Ed.) p. 36. [II. 313].

766. Corporations may acquire by gift *inter vivos*, as by others contracts, such property as they are allowed to possess.—C. C., 358 ; C. N. 910 ; Thev. d'Ess. (Can. Ed.) loc. cit. [II. 313.]

767. Minors become of age, and persons who have been under the control of others, cannot give *inter vivos* to their former tutors or curators, so long as their administration actually continues and they have not rendered their account ; [they may however give to their own ascendants who have exercised these offices.]—Paris, 276; Pothier, *Don.*, 450 ; 1 Ricard, part. 1, nn. 457-465 ; Guyot, *Incapacité*, 108 ; 7 N. Den., 34 ; C. N., 907 ; Thev. d'Ess. (Can. Ed.) p. 29. [II. 313.]

768. Gifts *inter vivos* made in favor of the person with whom the donor has lived in concubinage, or of the incestuous or adulterine children of such donor, are limited to maintenance.

[This restriction does not apply to gifts made in a contract of marriage entered into between the concubinaries.

Other illegitimate children may receive by gift *inter vivos* like all other persons.]—Ricard, *Don.*, part. 1, nn. 408 et seq.; Ord. 1629, art. 132; Guyot, *Incapacité*, 99; Merlin, Rép., *Concubinage*, nn. 2, 3 ; 7 N. Den. 34; C. N., 908 ; Thev. d'Ess., (Can. Ed.) p. 30. [II. 313.]

DECISION :—An adulterine bastard to whom a gift was made by substitution before the passing of the Canadian Act removing his inability to receive, will be, as substitute, entitled to receive the substitution opened in his favor after the passing of the said Act. The conjoint operation of the Imperial Act (14 Geo. III, c. 83), and of the Canadian Act (41 Geo. III, c. 4), is to abrogate the old law which prohibited gifts by will to adulterine bastards. — PRIVY COUNCIL.—*King & Tunstall*, 20 L. C. J., p. 49, 6 R. L., p. 358, 6 P. C. App., p. 55.

Digitized by Google

769. [Gifts *inter vivos* made in favor of the priests or ministers of religion having the spiritual direction of the donor, of the physicians and others attending him with the view of restoring his health, or of the advocates and attorneys engaged in lawsuits in his behalf, cannot be set aside by mere presumption of law, as defective by reason of undue influence or want of consent. The presumption in this case, as in all others, must be established by facts.]—1 Ricard, part. 1, nn. 498 et seq.; Guyot, *Incapacité* 107; Pothier, *Don.*, 454-455; C. N., 909 ; Thev. d'Ess., (Can. Ed.) loc. cit. [II. 315.]

770. The prohibition against consorts benefiting each other during marriage by acts *inter vivos* is set forth in the title concerning marriage covenants.—C. N., 1099. [II. 315.]

771. The capacity to give or to receive *inter vivos* is to be considered relatively to the time of the gift. It must exist at each period, with the donor and with the donee, when the gift and the acceptance are effected by different acts.

It suffices that the donee be conceived at the time of the gift or when it takes effect in his favor, provided he be afterwards born viable.—1 Ricard, part. 1, nn. 790, 791 ; Pothier, *Don.*, 455-6 ; C. N., 906 ; Thev. d'Ess., (Can. Ed.) pp. 30-38. [II. 315.]

772. The favor given to contracts of marriage renders valid the gifts therein made to the children to be born of the intended marriage.

It is not necessary that the substitute should be in existence at the time of the gift by which the substitution is created.—1 Ricard, part. 1, nn. 869, 870 ; 2 Bourjon, 113 ; Pothier, *Don.*, 455 ; 7 Nouv. Deniz., 34, 53; C. C., 838; C. N., 1081 ; Thev. d'Ess. (Can. Ed.) loc. cit. [II. 315.]

773. A gift *inter vivos* of the property of another is void ; it is however valid if the donor subsequently become proprietor of it.—Guyot, *Don.*, 173 ; 1 Thév.-Dessaules, *Dict. du Dig.*, 192 ; Pothier, *Don.*, 486. [II. 315.]

774. Dispositions made in favor of persons incapable of receiving are void, whether they are concealed under the form of onerous contracts, or executed in the name of persons interposed.

The ascendants, the descendants, the presumptive heir at the time of the gift, and the consort of the incapable person are held to

Digitized by Google

be interposed, unless relations of kindred, or of services rendered, or other circumstances tend to destroy the presumption.

This nullity takes place even when the person interposed survives the person who is incapable.—1 Ricard, part. 1, nn. 708 et seq.; 2 Bourjon, 82 et seq., 93; Guyot, *Avantage*, 715; 2 Nouv. Deniz., 545 et seq., 7 do, 34; 1 Thév.-Des., *Dict. du Dig.*, 200; C. N., 1099, 1100; Thev. d'Ess., (Can. Ed.) p. 63. [II. 315.]

775. [Children of a deceased person cannot claim legitim in consequence of gifts made by him *inter vivos.*]—Thev. d'Ess., (Can. Ed.) p. 52. [II. 317].

DECISION:—Suivant l'esprit de la législation de 1774 et 1801 sur la liberté illimitée de tester, la demande en légitime n'existe plus en Bas-Canada.—Q. B.—*Quintin & Girard*, 2 L. C. J., p. 141.

SECTION II.—OF THE FORM OF GIFTS AND OF THEIR ACCEPTANCE.

776. Deeds containing gifts *inter vivos* must under pain of nullity be executed in notarial form and the original thereof be kept of record. The acceptance must be made in the same form.

Gifts of moveable property, accompanied by delivery, may however be made and accepted by private writings, or verbal agreements.

Gifts validly made out of Lower Canada, or within its limits but in certain localities excepted by statute, need not be in notarial form.—Ord. de 1539, art. 133; Décl. février 1549; Sallé, *Ordon.*, p. 45; 3 Ferrière, sur Paris, p. 1089; Ord. de 1731, art. 1, 2; Pothier, *Don*, sec. 2, art. 4; 2 Bourjon, 107, 123; Guyot, *Don.*, 178; 7 N.. Den., 55; C. S. L. C., c. 38; C. N., 931. [II. 319.]

DECISIONS:—1. Un acte de donation doit être maintenu, bien que, lors de sa passation, le notaire instrumentant, à cause de l'affaiblissement de sa vue, ne pouvait plus écrire, si ce n'est pour signer son nom.—LORANGER, J.—*Raiche vs Alie*, 1 R. L., p. 77.

2. A donation of moveables without tradition is a nullity. (But see now C. C. 477 and 795.)—K. B.—*Gauvin vs Caron*, 2 R. de L., p. 276.

3. A written will, duly executed before three witnesses, may be altered, in its bequests, by cheques signed by the testator during his last illness, and left, "as parting gifts," for the parties indicated in them, in the hands of his private secretary. Probate of a written memorandum of such bequests made by the testator's private secretary, at his request, as his "last bequests," will suffice to entitle the legatees to recover, without obtaining probate of the cheques themselves.—Q. B.—*Colville & Flanagan*, 8 L. C. J., p. 225.

4. The gift of moveable effects by parents to their children, followed by tradition and possession, is complete without the necessity of any written contract

Digitized by Google

to establish the same, and verbal testimony thereof is admissible.—Q. B.—*Mahoney & McCready*, 15 L. C. R., p. 27, 1 R. C., p. 237.

5. The parol testimony of witnesses is admissible to prove the fact of the gift, in certain cases coming within the clause of *don manuel*.—PRIVY COUNCIL.—*Richer & Voyer*, 5 P. C. App., p. 461, 5 R. L., p. 591.

6. When the defendant had given his son a piano some five years before it was judicially seized, and his son had been in possession of it, although allowing it to remain in the house of his father, where the son himself lived, and had used it to give lessons with, it was held that the donation and acceptance were valid.—BÉLANGER, J.—*McMaster vs Moreau*, 3 L. N., p. 91.

See also cases noted at C. C. 787.

777. It is essential to gifts intended to take effect *inter vivos* that the donor should actually divest himself of his ownership in the thing given.

[The consent of the parties is sufficient, as in sale, without the necessity of delivery.]

The donor may reserve to himself the usufruct or precarious possession, or he may pass the usufruct to one person, and give the naked ownership to another, provided he divest himself of his right of ownership.

The thing given may be claimed, as in the case of sale, from the donor who withholds it, and the donee may demand the rescission of the gift in default of its being delivered, without prejudice to his damages in cases where he may claim them.

[If without reservation of usufruct or of precarious possession, the thing given remain unclaimed in the hands of the donor until his death, it may be revendicated from his heirs, provided the deed has been registered during the lifetime of the donor.]

The gift of an annuity created by the deed of such gift, or of a sum of money or other indeterminate thing which the donor promises to pay or to deliver, divests the donor in the sense that he becomes the debtor of the donee.—*ff* L. 9, § 3, L. 2, § 6, L. 6, *De donat.*; 1 Ricard, part. 1, nn. 896, 903, 919, 920, 930, 948, 953, 955, 967; *Ord. des Don.* art. 15; Paris, 275; Pothier, *Don.* 464 et seq.; 2 Bourjon, 112; Guyot, *Don.* 175, 178, 179, 180, 185; C N., 938, 949. [II. 319.]

DECISIONS:—1. Que suivant les principes qui régissaient les donations avant le Code Civil, lorsque le donateur reste en possession publique, ouverte et non interrompue, pendant au-delà de quarante ans, des immeubles donnés, et que le dit donataire n'en a jamais eu livraison et possession, cette donation n'a aucun effet.—C. R.—*Lesage vs Prud'homme*, 11 R. L., p. 475.

2. Comment s'établit la preuve d'une donation ou don manuel.—C. R.—*Molleur vs Roy*, 31 L. C. J., p. 99.

Digitized by Google

778. Present property only can be given by acts *inter vivos*. All gifts of future property by such acts are void, as made in contemplation of death. Gifts comprising both present and future property are void as to the latter, but the cumulation does not render void the gift of the present property.

The prohibition contained in this article does not extend to gifts made in a contract of marriage.—1 Ricard, part. 1, n. 1024, with restrictions; Pothier, *Don.*, 467-8-9; *Ord. des don.*, art. 3 et 4 (15 *contrà*); Sallé sur id., pp. 35-6; 7 N. Den., 39, (50 contrà); 2 Bourjon, 119; C. N., 943; Thev. d'Ess., (Can. Ed.) p. 129. [II. 321.]

DECISIONS:—1. Un testament qui ratifie une donation n'est censé la ratifier que pour les dispositions qui sont légales dans une donation entrevifs, et ainsi une donation contenant don de biens présents qui est ratifiée par un testament subséquent ne l'est que quant aux biens présents.—Q. B.—*Morency & Morency*, 8 R. L., p. 634.

2. That the donation of a sum of money payable at the death of the donor "à prendre sur tous les biens meubles et immeubles les plus clairs et apparents "qui se trouveront lui appartenir au jour de son décès," is invalid.—MEREDITH, C. J.—*Bourget vs Guay*, 8 Q. L. R., p. 173.

779. A. donor may stipulate for the right of taking back the thing given, in the event of the donee alone, or of the donee and his descendants dying before him.

A resolutive condition may in all cases be stipulated, either in favor of the donor alone, or of third persons.

The right to take back, or any other resolutive right, is exercised in cases of gift in the same manner and with the same effects as the right of redemption in the case of sale.—*Cod.*, L. 2, *De don. quæ sub modo*; Paris, 275; Pothier, *Obl.*, nn. 72, 73; *Ord. des Don.*, art. 15; C. C., 1029; 14 Merlin, *Quest.*, pp. 368, 378; Troplong, *Don.*, n. 1263 et seq.; *Contrà, Archambault vs Archambault*, C. S. Montréal; C. N., 949, 951, 952. [II. 321.]

DECISIONS:—1. A. by donation *inter vivos*, gave his property to his son B. to be enjoyed by him *à titre de constitut précaire sa vie durante* and to his said son's children in property after his death. The donation declared that in default of such issue, the property should belong to the other heirs of the donor, who should enjoy and dispose of it in such manner as the donor should direct by will. The donor made his will before making the donation, by which he gave all his property in usufruct to his said son B., and the property thereof to B.'s children, and gave B. power by his own will to dispose of and to apportion said property as he pleased among the testator's grand-children, and by a codicil executed after the donation, confirmed the will. *Held:* 1. That the donation did not create a substitution, in default of lawful issue to B., in favor of the other heirs of the donor. 2. That the conditional reversion of the property provided by the donation was perfectly legal. 3. That under the circumstances, B. had a legal right to

Digitized by Google

bequeath his property as he did.—PRIVY COUNCIL.—*Herse & Dufaux*, 17 L. C. J., p. 147, 4 P. C. App., p. 468.

2. Que lorsqu'une donation entrevifs est faite à certaine condition, qui, par son avènement, annule l'acte, le donateur, qui redevient propriétaire, a droit d'obtenir des donataires un titre régulier et authentique.—Que dans ce cas, les donataires sont tenus, conjointement et solidairement, de rendre compte au donateur de leur jouissance de la propriété depuis l'avènement de la condition.—TASCHEREAU, J.—*Thivierge vs Thivierge*, M. L. R., 2 S. C., p. 198.

780. A gift may consist of a person's whole property, and it is then universal ; or of the whole of the moveable or immoveable property, of the whole of the property of the matrimonial community or of any other universality, or of an aliquot portion of such property, and is in such cases a gift by general title ; or it may be limited to things particularly described, and is then a gift by particular title.—1 Ricard, part. 1, n. 1656 ; 2 Bourjon, 102 ; Guyot, *Don.*, 170 ; Pothier, *Don.*, 456 ; 7 Nouv. Deniz., 36. [II. 321.]

781. The abandonment or the partition of present property is considered as a gift *inter vivos*, and is subject to the same rules.

The same disposition cannot be made in contemplation of death in an act *inter vivos*, except by means of a gift inserted in a contract of marriage, such as is treated of in the sixth section of this chapter.—*Consequence of articles* 754, 757 ; 7 Nouv. Deniz., p. 81 ; C. N., 1075. [II. 323.]

782. It may be stipulated that a gift *inter vivos* shall be suspended, revoked, or reduced, under conditions which do not depend solely upon the will of the donor.

If the donor reserve to himself the right to dispose of or to take back at pleasure some object included in the gift, or a sum of money out of the property given, the gift holds good for the remainder, but is void as to the part reserved, which continues to belong to the donor, except in gifts by contract of marriage.—Paris, 273, 274 ; *Ord. des Don.*, art. 16 ; Pothier, *Don.*, 463-4 ; 1 Ricard, part. 1, nn. 984 et seq., 1032, 1033, 1038, 1039, 1044 et seq. ; 1 *Dict. du Dig.*, 199 ; 7 Nouv. Deniz., 49, 81 et seq. ; C. N., 944, 946, 947. [II. 323.]

DECISIONS :—1. The father and mother of the defendant gave to him certain property upon certain conditions mentioned in the contract, the principle ones being that he should lodge, board and provide for his parents during their life-time and pay them an annuity, subject to the proviso that the defendant could neither sell, hypothecate or alienate the property without the written consent of his parents. It was further stipulated that if this proviso was contravened, from the moment that the land passed into the hands of third parties, the

Digitized by Google

annuity should be doubled. The plaintiff obtained judgment against the defendant and sought to sell the property in question, whereupon the parents opposed the sale unless they were collocated for an annuity under the terms of their deed of donation. The opposition was dismissed.—BÉLANGER, J.—*Giguère vs Giguère*, 6 R. L., p. 33.

2. La prestation suivante portée dans un acte de donation entrevifs de père à fils, "que si le donataire venait à vendre, échanger ou donner le dit terrain à des étrangers ou à faire quelqu'autre acte équipollent à vente, il sera tenu et obligé tel qu'il le promet en ces présentes, de bailler et payer aux dits donateurs seulement la somme de deux mille livres ancien cours, le jour de la passation soit des actes de vente, échange, donation et autres actes équipollents à vente," n'est pas comminatoire, mais elle est réputée être une charge de la donation, exigible sitôt que la terre a été vendue au défendeur, un étranger.—BADGLEY, J.—*Cheval vs Morin*, 6 L. C. J., p. 229.

3. That an onerous donation is in the nature of a sale, and, therefore, such a deed, made notarially, in November, 1866, but not countersigned, and followed by possession, was not *ipso jure* null and void, and was good, under any circumstances, so far as the moveables given were concerned.—That the resiliation of such a deed, obtained from the donee, without legal consideration, and by fraud and *dol*, will be set aside.—Q. B.—*Doutney & Richard*, 24 L. C. J., p. 30.

783. All gifts *inter vivos* stipulated to be revocable at the mere will of the donor are void.

This does not apply to gifts made by contract of marriage.—Paris, 273, 274; 1 Ricard, part. 1, n. 970; C. N., 944, 947. [II. 323.]

784. Gifts *inter vivos* of present property are void if they are made subject to the condition of paying other debts or charges than those which exist at the time of such gifts, or than those to come, the nature and amount of which have been expressed and defined in the deed or in the statement annexed to it.

This article does not apply to gifts by contract of marriage.—1 Ricard, part. 1, nn. 1027, 1029; 7 N. Den. 49; Ord. des Don., art. 16; Pothier, *Don.* 463-4; C. N., 945, 947. [II. 323.]

DECISION:—A notary who executed a deed of donation, with a stipulation to pay future undetermined debts, was held liable in mitigated damages for the *faute grave*.—C. R.—*Dupuis vs Rieutord*, 30 L. C. J., p. 99, M. L. R., 2 S. C., p. 226.—JETTÉ, J.—M. L. R., 1 S. C., p. 356.

785. The causes of nullity and prohibitions declared in the last three preceding articles and article 778, take effect notwithstanding stipulations or renunciations by which it may be sought to evade them.—1 Ricard, part. 1, n. 1000; 7 N. Den., 44. [II. 323.]

786. [Unless some special law requires it, a deed of gift need not be accompanied by a statement of the moveable property given;

Digitized by Google

the legal proof of its nature and quantity devolves upon the donee.]—Guyot, *Don.*, 174. [II. 323.]

787. Gifts *inter vivos* do not bind the donor nor produce any effect until after they are accepted. If the donor be not present at the acceptance, they take effect only from the day on which he acknowledges or is notified of it.—Ricard, *Don.*, part. 1, nn. 834-5-6; Guyot, *Don.*, 171; 1 N. Den., 87. [II. 323.]

DECISIONS:—1. A stipulation for the benefit of a third party made in a deed of donation may be revoked by the donor, even without the consent of the donee, if he has no interest in its fulfilment; so long as the person intended to be benefited has not expressed his intention of accepting it.—C. R.—*Grenier vs Leroux*, 1 L. N., p. 231.

2. A donation can legally and rightfully be revoked and annulled before acceptance.—C. R.—*Lalonde vs Martin*, 6 L. C. R., p. 51.

3. Que l'acceptation du don d'une chose mobilière, signifiée du vivant du donateur, par le donataire ou mandataire qui l'a reçue pour la lui remettre, change la possession de celui-ci qui ne la détient plus, de ce moment, que comme mandataire du donataire, et fait la donation complète et irrévocable, et le donataire propriétaire.—Qu'après cette signification d'acceptation, le donataire a une action contre le mandataire pour le forcer à lui remettre la chose donnée.—C. R.—*Drouin vs Provencher*, 9 Q. L. R., p. 179.

4. Where a father purported to have given certain bank shares to his children by means of a writing transferring such shares from his own name, in the books of the bank, to that of his own name "*in trust*," it was held that the alleged donation was invalid for want of proper acceptance, *malgré* 303 C. C.—MEREDITH, C. J.—*Walsh vs Union Bank*, 5 Q. L. R., p. 289.

5. See case of, BÉLANGER, J.—*McMaster vs Moreau*, 3 L. N., p. 91, noted at C. C. 776.

788. [The acceptance of a gift need not be in express terms. It may be inferred from the deed or from circumstances, among which may be counted the presence of the donee to the deed, and his signature.]

This acceptance is presumed in a contract of marriage, as well with regard to the consorts as to the future children. In gifts of moveable property this presumption also results from the delivery. Ricard, *Don.*, part 1, nn. 838, 842, 869, 890, 891; Guyot. *Don.*, 171-2; 7 N. Den. 81, 1 *Do.* 87. [II. 325.]

DECISIONS:—1. A deed of retrocession of a donation made to a minor and accepted on his behalf by a stranger is a sufficient ratification of the donation and the covenants contained in the donation in favor of the donee must be fulfilled.—Q. B.—*Judd & Esty*, 6 L. C. R., p. 12.

2. Le donataire chargé du paiement de sommes d'argent à des créanciers du donateur qui, après la résiliation de l'acte de donation, demeurent en possession des immeubles à lui donnés, ne peut se prévaloir de cette résiliation intervenue

Digitized by Google

entre lui et les donateurs, faute d'avoir été suivie d'effet.—SMITH, J.—*Poirier vs. Lacroix*, 6 L. C. J., p. 302.

3. The parties to a marriage contract followed by marriage and the registration of said contract, whereby a sum is payable by the wife to a third party, cannot annul the clause by which said sum is payable to the third party without the consent of the latter.—TORRANCE, J.—*Charlebois vs Cahill*, 20 L. C. J., p. 27.

789. Gifts *inter vivos* may be accepted by the donee himself authorized and assisted if so it be, as in other contracts; minors, persons interdicted for prodigality, and those to whom an adviser has been judicially appointed, may also accept unassisted, saving their right to be relieved; tutors, curators and ascendants may accept in behalf of minors, as laid down in the title *Of Minority, Tutorship and Emancipation*, and curators appointed to interdicted persons may also accept for such persons.

The persons who compose a corporation or administer for it may also accept gifts in its behalf.—Ricard, *Don.*, part. 1, nn. 844-5; 2 Bourjon, 120-1; Guyot, *Don.*, 171; 1 N. Den., 89, 90. [II. 325.]

DECISION:—Que la résiliation, par le donateur et le donataire, de la donation créant une substitution en faveur des enfants à naître du donataire, n'affecte pas la substitution, ni les droits des appelés.—C. R.—*Beaulieu vs Hayward*, 10 Q. L. R., p. 275.

790. In gifts *inter vivos* in favor of children born and to be born, where such gifts may be made, the acceptance by those who are born, or by a qualified person for them, holds good for the others not yet born, if they avail themselves of it.—1 Ricard, *Don.*, part. 1, n. 870. [II. 325.]

791. The acceptance may be subsequent to the deed of gift; but it must be made during the lifetime of the donor, and while he is still capable of giving.—Pothier, *Don.*, 460; Troplong, *Don.*, n. 1102; Ricard, *Don.*, part. 1, n. 792, C. N. 932. [II. 325.]

DECISIONS:—1. Que l'acceptation d'une donation sous la charge imposée au donataire de donner quelque chose à un tiers, rend parfaite la donation sans l'intervention de ce tiers qui acquiert ainsi le droit d'exiger, en son temps, l'accomplissement de cette charge stipulée à son profit.—Q. B.—*Paré & Paré*, 3 Q. B. R., p. 359.

2. L'acceptation subséquente d'une donation, n'a aucun effet rétroactif.—C. R.—*Roy vs Vacher*, 4 R. L., p. 64, 16 L. C. J., p. 43.

792. [Minors and interdicted persons cannot be relieved from the acceptance or repudiation made in their name by a qualified person, if it have been previously authorized by a judge, upon the advice of a

Digitized by Google

family council. With these formalities the acceptance is as effectual as if it were made by a person of age, in the full exercise of his rights.]—Guyot, *Don.* 172 ; *Contrà*, Ferrières, *Tutelles*, p. 291. [II. 325.]

793. Deeds of gift may be executed subject to acceptance, without the donee being therein represented. An acceptance purporting to be made by the notary, or other person not authorized, does not render the gift void, but it is without effect, and the confirmation by the donee can only avail as an acceptance from the time at which it takes place.—I Ricard, *Don.*, part. 1, nn. 866, 878, 835 ; 2 Bourjon, 120 ; Ord. des Don., art. 5 ; Pothier, *Don., eod. loc.* ; Guyot, *Accept.*, 99 ; *Don.*, 171 ; Ord., 1539, art. 133. [II. 325.]

DECISION :—L'acceptation subséquente d'une donation, n'a aucun effet rétroactif.—C. R.—*Roy vs Vacher*, 16 L. C. J., p. 43, 14 R. L., p. 64.

794. Gifts cannot be accepted after the death of the donee by his heirs or representatives.—Lemaître, 372 ; 2 Bourjon, 123 ; Pothier, *Don*, 457-8 et seq. [II. 325.]

SECTION III.—OF THE EFFECT OF GIFTS.

795. [Gifts *inter vivos* of present property when they are accepted, divest the donor of and vest the donee with the ownership of the thing given, as in sale, without any delivery being necessary.]—1 Ricard, part 1, nn. 899, 900, 902 ; 2 Bourjon, 109 et seq. ; Pothier, *Obl.*, 44, *Don.*, pp. 485-7 ; Guyot, *Don.*, 179 ; 7 N. Den., 39 et seq. ; C. N., 938. [II. 327.]

DECISIONS :—1. A donation of moveables by a contract of marriage does not require an actual delivery.—C. R.—*White vs Atkins*, 5 L. C. R., p. 421.

2. Madame Selby et son frère firent à leur père une donation de l'usufruit de certains immeubles. *Jugé*, qu'ils ne sont pas pour cela déchargés de l'obligation de payer les taxes de la cité.—C. R.—*Corporation de Montréal vs Donegani*, 3 R. L., p. 448.

796. Gifts do not by the mere effect of law give rise to any obligation of warranty on the part of the donor, who is deemed to give the thing only in so far as it belongs to him.

Nevertheless if the cause of eviction arise from the indebtedness or the act of the donor, he is obliged, though he have acted in good faith, to reimburse the donee who has paid to free himself ; unless the latter be bound to make such payment in virtue of the deed of gift, either by law or by agreement.

Warranty to a greater or less extent may be stipulated in gifts, as in any other contracts. — 2 Bourjon, 106, 137 ; Anc. Den. vo.

Digitized by Google

Garantie, n. 17; Pothier, *Don.*, 485-6; 7 No. Den., 22; 1 *Dict. du Dig.*, 192. [II. 327.]

797. A universal donee *inter vivos* of present property is personally liable for all the debts due by the donor at the time of the gift.

A donee by general title *inter vivos* of such property is personally liable for such debts in proportion to what he receives.—Paris, 334; 1 Ricard, part. 1, nn. 1514, 1063; Pothier, *Don.*, 487-8-9; 2 Bourjon, 137; 7 N. Den., 11, 12, 13; Troplong, *Don.*, 2415 *in fine*. [II. 327.]

798. Nevertheless the donee, by whatsoever title, may, if the things given be sufficiently particularized in the gift, or if he have made an inventory, free himself from the debts of the donor by rendering an account and giving up all that he has received.

If he be sued hypothecarily only, he may, like any other possessor, free himself by abandoning the immoveable hypothecated, without prejudice to the rights of the donor, towards whom he may be bound to make the payment.—Pothier, *Don.*, 489; 2 Bourjon, 137-8. [II. 327.]

799. A donee by particular title *inter vivos* is not personally liable for the debts of the donor. In case of an hypothecary action he may abandon the immoveable charged, like any other purchaser.—Pothier, *Don.*, 487; 2 Bourjon, 137-8. [II. 327.]

DECISION:—La donation limitée à des choses désignées particulièrement est une donation à titre particulier.—Le donataire à titre particulier n'est pas tenu personnellement aux dettes du donateur.—MONDELET, J.—*Paquin vs Bradley*, 14 L. C. J., p. 208.

800. The obligation to pay the debts of the donor may be extended or limited by the deed of gift, subject to the legal prohibitions concerning future and uncertain debts.

The right of the creditor in such case against the donee personally, beyond that which results from the law, is governed by the rules set forth as to delegation and indication in matters of payment in the title *Of Obligations*.—1 Ricard, part, 1, n. 1028; 7 Nouv. Den., p. 12. [II. 327.]

DECISION:—The parties to a marriage contract followed by marriage and the registration of said contract, whereby a sum is payable to a third party, cannot annul the clause by which said sum is payable to the third party, without the consent of the last.—TORRANCE, J.—*Charlebois vs Cahill*, 20 L. C. J., p. 27.

Digitized by Google

801. The exception of particular things, whatever may be their number or value, in a universal gift or a gift by general title, does not exonerate the donee from payment of the debts. — 7 Nouv. Den., 11. [II. 329.]

802. The creditors of the donor have a right to demand the separation of his property from that of the donee, whenever the latter is liable for the debt, according to the rules laid down in the preceding title as to such separations in matters of succession.—[II. 329.]

803. If at the time of the gift, and deduction being made of the things given, the donor were insolvent, the previous creditors, whether their claims are hypothecary or not, may obtain the revocation of the gift, even though the donee were ignorant of the insolvency.

In the case of insolvent traders, gifts made by them within three months previous to the assignment, or the writ of attachment in compulsory liquidation, are voidable, as presumed to be fraudulent.—1 Ricard, part. 1. nn. 749 et seq.; C. C., 1032 et seq.; [II. 329, III. 379.]

SECTION IV.—OF REGISTRATION AS REGARDS GIFTS INTER VIVOS IN PARTICULAR.

804. Registration of gifts *inter vivos* in the offices established for the registration of real rights, takes the place of the inscription in the offices of the courts which is abolished.

Gifts of immoveables must be registered in the office of the division in which they are situate; gifts of moveable property, in the office of the division where the donor resided at the time of the gift. —Ord. 1539, art. 132; Ord. 1566, *Moulins*, art. 58; Ord. des Don., art. 23; C. S. L. C., c. 37, sec. 28, 29; C. N., 939. [II. 329.]

DECISION :—See case of C. R.—*Marchessault vs Durand*, 16 R. L., p. 193 noted at C. C. 757 & 1384.

805. The effect of the registration of gifts *inter vivos* and of the neglect of such registration, is regulated, as to immoveables and real rights, by the general laws concerning the registration of such rights.

Beyond this the registration of gifts is required particularly in the interest of the heirs and the legatees of the donor, his creditors and all others interested, according to the following rules.—Ord. des Don., art. 27 ; C. S. L. C., c. 37, s. 1. [II, 329.]

Digitized by Google

806. All gifts *inter vivos*, of moveable or immoveable property, even those which are remuneratory, must be registered ; save the exceptions contained in the two following articles. The donor himself cannot set up the want of registration, neither can the donee or his heirs ; but it may be set up by any person entitled to do so under the general registry laws, by the heir of the donor, by his universal or his particular legatees, by his creditors, even though they be posterior and not hypothecary, and by all other persons interested in having the gift declared void.—Ord., *Moulins*, art. 58 ; 1 Ricard, part. 1, nn. 1231 et seq. ; Ord. des Don., art. 20, 27 ; 2 Bourjon. 128 ; Guyot, *Don.*, 187 ; C. N., 941. [II. 329.]

DECISIONS :—1. Une donation onéreuse dont les charges excèdent la valeu des biens donnés n'est pas nulle faute d'insinuation.—Badgley, J.—*Rochon vs Duchêne*, 3 L. C. J., p. 183.

2. Un acte de donation entrevifs, dont les obligations en égalent au moins les avantages, n'a pas besoin d'être insinué ni enregistré pour être valable. Le donataire ne peut se prévaloir du défaut d'insinuation ou d'enregistrement.—Smith, J. —*Poirier vs Lacroix*, 6 L. C. J., p. 302.

3. The heirs of a donor can invoke the nullity arising out of the want of insinuation of the deed of donation. Where property has been donated with charges upon it which are equivalent to the value of the property, the deed of donation need not be registered. *Semble* that the donor himself cannot invoke such nullity as the want of insinuation —Smith, J.—*Leroux vs Crevier*, 7 L. C. J., p. 336.

4. L'acceptation subséquente d'une donation, n'a aucun effet rétroactif. Le créancier inscrit postérieurement à cette donation non enregistrée doit être payé au préjudice du donataire.—C. R.—*Roy vs. Vacher*, 16 L. C. J., p. 43.

5. Dans le cas d'une donation d'immeuble non enregistrée, faite avant la mise en force du code, à la charge d'une rente viagère, le donateur ne peut prétendre avoir acquis sur l'immeuble une hypothèque pour sa rente, par l'enregistrement d'un acte de donation subséquent, par lequel le donataire aurait cédé le même immeuble à un tiers, à la charge de payer au premier donateur la rente stipulée dans le premier acte de donation, si la rente n'est pas détaillée dans le dit acte de donation.—Chagnon, J.—*Arpin vs Lamoureux*, 7 L. C. J., p. 203.

6. Que la donation de biens mobiliers, faite en un contrat de mariage, par le mari à sa femme, est valable, entre les parties, sans la formalité de l'enregistrement, et que la dite donation ne peut être affectée que pour les droits acquis par des tiers au moment où telle donation est faite et enregistrée.—C. R.—*Morin vs Langlois*, 30 L. C. J., p. 272.

7. Que la femme mariée, séparée de biens, ne peut invoquer son contrat de mariage non enregistré lui donnant les biens-meubles d'une saisie faite contre son époux, sans établir qu'elle a eu la tradition réelle et la possession publique de ces effets.—Mathieu, J.—*McGarvey vs Sauvale*, 15 R. L., p. 462.

807. Gifts made in the direct line by contract of marriage, are not affected by want of registration further than they may be under the general registry laws.

Digitized by Google

All other gifts in contracts of marriage, even between future consorts, or in contemplation of death, and all other gifts in the direct line, remain subject to registration in the same manner as gifts in general.—1 Ricard, part. 1, nn. 1107, 1123; 2 Bourjon, 132; Ord. des Don., art. 19, 22, 28. [II. 329 to 331.]

808. Gifts of moveable effects, whether universal or particular, are exempt from registration when they are followed by actual delivery and public possession by the donee.—1 Ricard, part. 1, nn. 1151-2; 2 Bourjon, 134. [II. 331.]

DECISION:—Le défaut d'enregistrement d'une donation mobilière et le défaut de la livraison des effets ainsi donnés, privent le donataire de se prévaloir du droit de propriété qui aurait pu résulter de la donation à l'encontre des créanciers du donateur.—DORION, J.—*Crossen vs O'Hara*, 21 L. C. J., 103.

809. Gifts are subject to the rules concerning registration of real rights contained in the eighteenth title of this book, and are no longer subject to the rules which governed inscriptions in the prothonotary's office.—C. S. L. C., c. 37, s. 1, 9. [II. 331.]

810. The donor is not liable for the consequences of the want of registration, although he have bound himself to effect it.

Married women, minors and interdicted persons cannot be relieved from the failure to register the gift, but they have their recourse against those who neglected to effect such registration.

Husbands, tutors, administrators, and others whose duty it is to attend to such registration, cannot avail themselves of the absence of it.—1 Ricard, part. 1, nn. 1172, 1238, 1239 et seq.; 2 Bourjon, 128-9; Ord. des Don., art. 18, 30, 31, 32; Guyot, *Don.*, 188; C. N., 940, 941, 942. [II. 331.

SECTION V.—OF THE REVOCATION OF GIFTS.

811. Gifts *inter vivos* accepted are liable to be revoked:

1. By reason of ingratitude on the part of the donee;

2. By means of the resolutive condition, in cases where it may be validly stipulated;

3; For the other legitimate causes by which contracts may be annulled, unless some particular exception is applicable. — *Cod.*, L. 2, L. 8, *de cond. ob caus. dat.*; L. 1, L. 8, L. 10, *de rev. donat.*; L. 1, L. 2, L. 3, *de donat. quæ sub modo*; C. C. 991, 1006; Ord. des Don., art. 39; Pothier, *Don.*, 489 et seq.; 1 Ricard, part. 1, nn. 557, 664 et

Digitized by Google

seq. 1044 et seq. ; 2 Bourjon, 138, 142, 149, 151 ; 7 Nouv. Deniz., 52-3 ; C. N., 953, 956 ; Pothier, *Don.*, 504 ; Code, *Vente*, art. 60 ; C. N., 954, 956. [II. 331 to 333.]

812. [In gifts, the subsequent birth of children to the donor does not constitute a resolutive condition, unless it is so stipulated.]—Ricard, *Don.*, part. 1, nn. 565, 574, 603 et seq., 648 et seq., *Révoc. des don.*, 55, 56 ; Ord. des don., art. 39 et seq. ; Pothier, *Don.*, 489 et seq. ; 2 Bourjon, 142-3-4-7-8 ; C, N., 960, 962, 963, 964, 965, 966. [II. 333.]

DECISIONS:—1. Une donation à titre onéreux, dont les charges égalent la valeur de l'immeuble donné, ne peut être annulée pour cause de survenance d'enfant, car dans ce cas, elle équipolle à vente.—DUVAL & MEREDITH, JJ.—*Sirois vs Michaud*, 2 L. C. R., p. 177.

2. Even prior to the promulgation of the Civil Code, by the law of Canada, being that which existed in the jurisprudence of the Parliament of Paris before the Ordinance of 1731, a gift *inter vivos* was not revocable on the birth of children to the donor.—PRIVY COUNCIL.—*Symes & Cuvillier*, 5 App. Cas., p. 138.—Q. B.—1 L. N., p. 302.

813. Gifts may be revoked by reason of ingratitude, without a stipulation to that effect :

1. If the donee have attempted the life of the donor ;

2. If he have been guilty towards him of ill usage, crimes, or grievous injuries ;

3. If he refuse him maintenance, regard being had to the nature of the gift and the circumstances of the parties.

Gifts by contract of marriage are subject to this revocation, and so are remunatory or onerous gifts in so far as they exceed the value of the services or of the charges. — Cod., L. 10, *de revocandis donationibus*; Pothier, *Don.*, 502 et seq; 2 Bourjon, 138-9 ; Guyot, *Ingratitude*, 228 ; C. N., 955, 956 ; *contrà*, 959. [II. 333.]

814. The demand of revocation on the ground of ingratitude must be made within a year from the date of the offence imputed to the donee, or within a year from the day when such offence became known to the donor.

Such revocation cannot be demanded by the donor against the heirs of the donee, nor by the heirs of the donor against the donee or his heirs, unless the action has been commenced by the donor against the donee himself, or unless, in the second case, the donor died within a year after the offence was committed or became known to him.

Digitized by Google

—Cod,, L. 10, *de revocandis donat.*; Ricard, part. 1, nn. 704 et seq., 730; 2 Bourjon, 140; Pothier, *Don.*, 502-509; C. N., 955, 956, 957. [II. 335.]

815. Revocation on the ground of ingratitude does not prejudice alienations made by the donee, nor hypothecs or other charges created by him, previously to the registration of the judgment of revocation, when the purchaser or creditor has acted in good faith.

In cases of revocation on the ground of ingratitude the donee is condemned to restore the thing given, if it be still in his possession, together with its fruits from the date of the judicial demand; if he have alienated it since such demand, he is condemned to restore what it was worth at the time of the demand.—Ricard, *Don.*, part. 3, nn. 714 et seq.; 2 Bourjon, 141; Guyot, *Révocation*, 702 et seq.; Pothier, *Don.*, 507-8; C. N., 955, 956, 958. [II. 335.]

DECISIONS:—1. La révocation d'une donation onéreuse n'entraîne pas l'extinction des hypothèques créées par le donataire sur l'immeuble rétrocédé. Les donations onéreuses n'ont pas besoin d'être insinuées et le donateur ou ses ayants cause n'en peuvent invoquer le défaut à l'égard d'un créancier du donataire.—C. R.—*Lafleur vs Girard*, 2 L. C. J., p. 30.

2. La résolution d'une donation ne peut être demandée, pour ingratitude, contre le tiers acquéreur, cessionnaire du donataire, quoique ce tiers acquéreur ait assumé le paiement des charges de la donation.—Le défaut de paiement des arrérages d'une rente viagère, qui n'est pas une cause de résolution sous le code français, l'est sous notre droit canadien.—La résolution d'un acte ne peut être poursuivie, sans mettre en cause toutes les parties à cet acte.—BERTHELOT, J.—*Martin vs Martin*, 3 L. C. J., p. 307.

816. [Gifts cannot be revoked by reason of the non-fulfilment of obligations entered into by the donee, as charges or otherwise, unless the revocation is stipulated in the deed; and such revocation is subject in all respects to the same rules as the dissolution of sale in default of payment of the price, without the necessity of any preliminary condemnation obliging the donee to the fulfilment of his obligations.]

The stipulation of all other resolutive conditions when legally made has the same effect in gifts as in other contracts.—Ricard, part. 3, n. 1044; Guy, *Don.*, 198; 7 N. Den., p. 9; C. N., 953, 956. [II. 335.]

DECISIONS:—1. Constant and habitual intoxication is a good cause for the resiliation of a donation.—K. B.—*Couture vs Begin*, 2 R. de L., p. 60.

2. A donation may be resiliated for non-payment of an annuity for which the *donateur* and the *donataire* have stipulated.—K. B.—*Migné vs Migné*, 2 R. de L., p. 209.

Digitized by Google

3. Where the *donataire*, by his own act, has rendered it impossible for him to perform a material condition of the donation, it is good cause for resiliation.—K. B.—*Lagacé vs Courberon*, 2 R. de L., p. 209.

4. La donataire d'un immeuble qui est poursuivi par son donateur, pour la résiliation de la donation, pour défaut d'accomplissement des charges imposées, doit dans cette instance réclamer le prix des améliorations qu'il prétend avoir droit de réclamer, et son défaut de ce faire soulève une présomption légale qu'il n'y a point d'améliorations dont il aurait pu réclamer le prix, ou qu'il a abandonné son droit de les réclamer.—LORANGER, J.—*Pearce vs Gibbon*, 6 R. L., p. 649.

SECTION VI.—OF GIFTS BY CONTRACT OF MARRIAGE, WHETHER OF PRESENT PROPERTY OR MADE IN CONTEMPLATION OF DEATH.

817. The rules concerning gifts *inter vivos* apply to those which are made by contract of marriage, with such modifications as result from special provisions.—C. N., 1081, 1092. [II. 335.]

DECISION :—Une donation entrevifs, faite avec toutes les formalités d'un tel acte, quelques jours avant la mort du donateur, lorsque la cause determinante de la mort ne s'est déclarée que depuis la donation, est valide, ne peut pas être considérée comme une donation à cause de mort et doit être maintenue.—LORANGER J.—*Raiche vs Alie*, 1 R. L., p. 77.

818. Fathers and mothers, and other ascendants, relations in general, and even strangers, may, in a contract of marriage, give to the future consorts or to one of them, or to the children to be born of their marriage, even with substitution, the whole or a portion of their present property, or of the property they may leave at their death, or of both together.—Ricard, part. 1, n. 1027 ; 2 Bourjon. 113-6 ; Guyot, *Don.*, 212 ; Pothier, *Mariage*, n. 2 ; Ord. des Don., art. 17 ; 7 Nouv. Deniz., 81 et seq., 91, 92 ; C. N., 943, 1082, 1084, 1089. [II. 335.]

DECISION :—Que sous les dispositions de l'ancien droit français, qui nous régissait avant la mise en force du Code Civil, et qui sont reproduits dans l'article 818 C. C., les pères et mères pouvaient, en un contrat de mariage de leurs enfants, faire donation aux futurs époux, ou, à l'un d'eux, des biens ou de partie des biens qu'ils délaissent à leur décès.—MATHIEU, J.—*McNamee vs McNanee*, 14 R. L., p. 30.

819. Subject to the same rules, when particular exceptions do not apply, future consorts may likewise, by their contract of marriage, give to each other, or one to the other, or to the children to be born of their marriage, property either present or future.—Ricard, part. 1, n. 364; 2 Bourjon, 113 et seq, ; Ord. des Don., art.17 ; 7 Nouv. Deniz., 81 et seq. ; C. N., 943, 1091. [II. 335 to 337.]

Digitized by Google

820. Owing to the favor of marriage and the interest which future consorts may have in arrangements made in favor of third persons, it is lawful for relations, for strangers, and for the future consorts themselves, to make in a contract of marriage whereby the future consorts or their children are benefited by the same donor, all gifts whatsoever of present property to third parties, whether relations or strangers.

For the same reasons, the ascendants of a future consort may, in a contract of marriage by which he also is benefited, make gifts in contemplation of death in favor of his brothers or sisters. All other gifts in contemplation of death made in favor of third parties are void.—Lebrun, *Suc.*, liv. 3, c. 2, nn. 12, 13 ; Ord. des Don., art. 17 ; Sallé, *sur Ord. des Don.*, p. 43 ; Anouilh, *Instit. contract.*, pp. 38, 39 ; C. N., 943, [II. 337.]

DECISIONS :—1. That a donation by a father to his daughter in her contract of marriage, of all his unencumbered real estate, will be set aside, as having been made in fraud of his creditors, if, by reason of such donation, the donor is unable to meet his engagements and more particularly, if the donation was made under circumstances creating a strong presumption that the donee was aware, at the time, of the effect of the donation on the solvency of the donor.—Q. B.—*Tracey & Liggett*, 3 Q. B. R., p. 247.

(Reversed on facts, in Supreme Court, 9 S. C. R., p. 44., 1 C. D., p. 137.)

2. That a donation, by marriage contract, by an insolvent person to his wife in fraud of his creditors, will be set aside, even although his wife had no share in the fraud.—Meredith, C. J.—*Behan vs Erickson*, 7 Q. L. R., p. 295.

821. Gifts of present property by contract of marriage are, like all others, subject to acceptance *inter vivos*. The acceptance is presumed in the cases mentioned in the second section of this chapter. Third parties not present to the deed may accept separately, either before or after the marriage, gifts made in their favor.—Ricard, part. 1, nn. 869, 875 ; Guyot, *Don.*, 172 ; Ord. des don., art. 10, 12, 13 ; 7 N. Den., 81 ; C. N., 1087. [II. 337.]

822. Gifts by contract of marriage of present or future property are valid, even as regards third parties, only in the event of the marriage taking place. If the donor or the third party who has accepted the gift die before the marriage, the gift is not void, but remains suspended by the condition that the marriage will take place.—Cod., L. 24, *de nuptiis ;* Brillon, *Don.*, n. 191 ; Pothier, *Com.*, 17 ; Troplong, *Don.*, 2471 et seq., *Mariage*, 90 ; C. N., 1088. [II. 337.]

823. Gifts of present property by contract of marriage cannot be revoked by the donor, even as regards third parties benefited who

Digitized by Google

have not yet accepted, unless for legal grounds, or by reason of a resolutive condition validly stipulated.

Gifts in contemplation of death, made by such acts, are irrevocable in so far that the donor, without legal grounds or a valid resolutive condition, cannot revoke them, nor dispose of the given property by gift *inter vivos* or by will, unless it is in small amounts, by way of recompense or otherwise. He remains nevertheless owner in other respects of the property thus given and may dispose of it by onerous title and for his own benefit. Even if the gift in contemplation of death be universal he may acquire and possess property and dispose of if under the foregoing restrictions, and may contract, otherwise than by gratuitous title, obligations which affect the property thus given.—Pothier, *Don.*, 469; Guyot, *Inst. Contract.*, 393 et seq.; 7 N. Den., 85 et seq.; Troplong, *Don.*, 2348 et seq.; C. N., 1083. [II. 337.]

DECISIONS:—1. La donation dans un contrat de mariage de tous les meubles que le donateur laissera à son décès dans une maison y désignée, devient caduque si le donateur vend les meubles avant son décès.—Q. B.—*Cahill & Hachette*, 7 R. L., p. 513.

2. Que l'acceptation d'une donation sous la charge imposée au donataire de donner quelque chose à un tiers, rend parfaite la donation sans l'intervention de ce tiers, qui acquiert ainsi le droit d'exiger en son temps, l'accomplissement de cette charge stipulée à son profit.—Q. B.—*Paré & Paré*, 3 Q. B. R., p. 359.

3. Que l'institué, dans une donation à cause de mort, faite par deux époux dans le contrat de mariage de l'institué, ne peut être poursuivi hypothécairement au sujet d'un immeuble appartenant au donateur, s'il est stipulé dans la donation que le survivant des donateurs restera en possession jusqu'à son décès, des biens donnés, l'institué n'étant considéré en possession qu'après le décès du survivant des donateurs, quoique l'immeuble, au sujet duquel il est poursuivi hypothécairement, soit un conquêt de la communauté des donateurs ou bien, la propriété pour partie du donateur décédé—Gill, J.—*Beauchemin vs Desilets*, 10 R. L., p. 323.

4. Que la donation par contrat de mariage du futur époux à la future épouse, du tiers des biens meubles et immeubles, qui appartiendrait à l'époux lors de son décès, si la future épouse lui survit, ne peut faire l'objet d'une réclamation lors de la faillite du mari.—Q. B.—*Workman & Mulholland*, 10 R. L., p. 412.

5. Que par les dispositions de notre ancien droit, reproduits dans l'article 823 C. C., la donation à cause de mort, par contrat de mariage, est irrévocable, et qu'à moins d'une cause de droit ou d'une condition résolutoire valide, le donateur ne peut la révoquer, ni disposer des biens donnés, par testament, si ce n'est pour une somme modique à titre de récompense ou autrement.—Mathieu, J.—*McNamee vs McNamee*, 14 R. L., p. 31.

824. It may be stipulated that a gift, either of present property or in contemplation of death, made in a contract of marriage, shall be

Digitized by Google

suspended, revocable, reducible, or subject to changeable or indeterminate reservations and rights of resumption, although the effect of the disposition depend upon the will of the donor. If, in the case of reservations and of a right of resumption, the donor do not exercise his right, the donee retains the full benefit of the gift to the exclusion of the heir of the donor.—Ricard, part. 1, n. 1015 ; 7 N. Den., 82 ; Ord. des Don., art. 17, 18 ; Pothier, *Don.*, 469 ; C. N., 944, 946, 1086, 1089, 1093. [II. 337.]

825. Gifts by contract of marriage may be made subject to the charge of paying the debts due by the donor at the time of his death, whether they are determinate or not.

In universal gifts or gifts by general title of future property or of present and future property together, this obligation falls on the donee without stipulation to that effect, for the whole or in proportion to what he receives.—Ord. des Don., art. 17 ; Pothier, *Don. test.*, p. 469 ; 7 N. Den., 91 et seq ; C. N.,947, 1084. [II. 339].

826. The donee, however, after the death of the donor, in gifts made wholly in contemplation of death and so long as he has not otherwise accepted, may free himself from the debts by renouncing the gift, after making an inventory and rendering an account, and by giving back any property of the donor remaining in his possession or which he may have alienated or mixed up with his own.—Pothier, *loc. cit.*; Ord. des Don., *loc. cit.* [II. 339.]

827. In cumulative gifts of present and future property the donee may also, after the death of the donor and so long as he has not accepted otherwise the gift in contemplation of death, free himself from the debts of the donor other than those for which he is liable under the gift *inter vivos*, by renouncing in the same manner the gift in contemplation of death, to restrict himself to the present property given him.—Same authorities as under the two preceding articles. —C. N. 1084. [II. 329.]

828. The donee may also at the same time renounce the present property and free himself from all liability, by making an inventory, rendering an account, and returning the property given, in the manner provided in respect of gifts in general.—C. C., 798. [II. 339.]

829. Notwithstanding the rule which excludes representation in the matter of legacies, gifts in contemplation of death made in

Digitized by Google

favor of future consorts or of one of them, by their ascendants or other relations, or by strangers, are always, in the event of the donor surviving the consort benefited, presumed to be made in favor of the children to be born of the marriage, unless it is otherwise provided.

The gift becomes extinct if when the donor dies neither the consorts or consort benefited, nor any children of theirs be living.—Lebrun, *Suc.*, liv. 3, c. 2, nn. 33, 34, 35, 36 ; Lacombe, vo. *Donation*, s. 7 ; 7 Nouv. Deniz., 85-6 ; 4 Marcadé, nn. 282–285 ; C. N., 1082. [II. 339.]

830. Gifts in contemplation of death made by contract of marriage, may be expressed in the terms of a gift, of an appointment of heir, of an assignment of dowry or dower, of a legacy, or in any other terms which indicate the intentions of the donor.—5 N. Deniz., 544 ; C. N. 967. [II. 339.]

CHAPTER THIRD.

OF WILLS.

SECTION I.—OF THE CAPACITY TO GIVE AND TO RECEIVE BY WILL.

831. Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favor of his consort, or of one or more of his children, or of any other person capable of acquiring and possessing, and without reserve, restriction, or limitation ; saving the prohibitions, restrictions, and causes of nullity mentioned in this code, and all dispositions and conditions contrary to public order or good morals.—Paris, 292 ; C. S. L. C., c. 34, s. 2 ; C. N., 901 ; Thev. d'Ess. (Can. Ed.) p. 31. [II, 339.]

DECISIONS.—1. A testator at the time of his decease, possessed of property belonging to the succession of his wife deceased, by an holograph will bequeathed all the property of which he might die seized to his heirs and legatees, who were also his wife's heirs, under the penalty, if any of them contested his will, that their share in his succession should be forfeited. He named two executors or trustees, and the survivor of them, for the administration of all his property until a partition. In the making of such partition he directed his executors to act for some of the legatees who where minors and for another who was married—without the authority of her husband for that purpose being requisite—and whose share they should administer during the husband's life, paying her the rents, etc. —*Held*, that the will was valid, but that its dispositions could be carried into effect only so far as they affect the succession of the testator, and that they could not

Digitized by Google

in any manner apply to the succession of the testator's wife of which his legatees were the heirs, and of which they were in law seized from the day of her death and that, one of the executors having renounced the execution of the will, the other had *saisine* of the testator's succession to carry his will into effect.—COURT OF APPEALS.—*Viger & Pothier*, Stuart's Rep., p. 394.

2. A clause in the will of a testator that the usufruct bequeathed by him in favour of his wife should cease on her marriage, held, not to be *contra bonos mores*.—C. R.—*Forsyth vs Williams*, 1 L. C. R., p. 102.

3, In matters of testamentary successions the *droit d'aînesse* in a partition of *biens nobles* can only subsist in virtue of a specific provision.—In the case submitted the provision of a testator to the effect that the surplus of his *biens nobles* shall be divided between his two children in such way as to give the older two thirds and one third to the other child, according to the law of fiefs, charging them nevertheless with the payment of the debts in proportion to their legacies the whole subject to an entail, does not contain a legacy of a *droit d'aînesse* and cannot give use to the exercise of that right in any of the parties claiming under the entail.—Q. B.—*Globenski & Laviolette*, 4 L. C. R., p. 384.

4. When a person is once plainly proved to have been insane, the existence of a lucid interval requires the most conclusive testimony to establish it; and the validity of a will made during an alléged lucid interval will not be presumed in the absence of such testimony.—JOHNSON, J.—*Close vs Dixon*, 17 L. C. J., p. 59.

5. A will made before a notary and two witnesses under circumstances which rendered it improbable that the testator was in the possession of his faculties, or that the will was dictated by him, cannot be maintained.—BADGLEY, J.—*Brunet vs Brunet*, 1 L. C. L. J., p. 60.

6. A testator can by his last will and testament constitute a sum of money a *propre* and make the legacy in question a moveable.—Q. B.—*Leprohon & Vallée*, 3 L. C. L. J., p. 93.

7. The testator directed that his son should not in any manner incumber, affect, mortgage, exchange or otherwise alienate the immoveable property given to him by the will until after twenty years from the death of the testator. The property, however, became mortgaged by him to the appellant within the twenty years and upon being taken in execution for the satisfaction of the mortgage, the respondent pleaded the nullity of the seizure and the exemption of the property from the payment of debts within the period above named. A general demurrer with assignment of causes was filed on behalf of the appellant, among other things, that the clause in question would not affect the seizure and was not binding on third parties not named in the will. *Held*, reversing the judgment of the Court of Queen's Bench and maintaining that of the Superior Court (TASCHEREAU, J.), that the restriction made by the testator was not valid, either by the old law of France or by the general principles of jurisprudence.—*Privy Council*: *Renaud & Guillet dit Tourangeau*, 17 L. C. R., p. 451; 12 L. C. J., p. 90; 2 P. C. App. p. 4; 5 Moore's P. C., Rep. [N. S.], p. 5.—Q. B.—4 L. C. L. J., p. 11, 13 L. C. R., p. 278; 7 L. C. J., p. 238.

8. Aliments, whether by disposition of the law or of man, are favored and *insaisissables* by law, and therefore a testamentary allowance by a father to his children, until the term fixed by his will for the final partition of his estate, is valid.—PRIVY COUNCIL.—*Muir & Muir*, 18 L. C. J., p. 96, 5 P. C. App. p. 66.—Q. B.—15 L. C. J., p. 309.

Digitized by Google

9. The action *ab irato* cannot be brought in this province, and the aversion to be a proof of insanity must be an aversion without cause.—C. R.—***Phillips & Anderson***, M. C. R., p. 87.

10. Un testament fait par une personne qui a perdu la mémoire des mots, mais qui a conservé une parfaite intelligence des choses, sera maintenu par la cour.—Q. B.—***Canac & Canac***, 1 Q. L. R., p. 50.

11. The 760th and 831st articles of the Civil Code of Canada must be read together, and by virtue of their provisions all conditions in a will, unless according to the plain meaning and intention of the testator they be contrary to law, public order or good morals, are effective, and cannot be regarded as minatory only, or dependant for their application upon the discretion of the Court. Such discretion is not conferred upon the Courts by the Code, and though exercised by the old French Parliament, has been since authoritatively condemned and repudiated.—Such a condition as that contained in the said penal clause can only, in practice, be applied where a will has been unsuccessfully contested, and would, therefore, be ineffective to protect an illegal disposition, or to render operative an invalid testament. It is not against public order for a testator to protect his estate and representative against unsuccessful attempts to litigate his will.—PRIVY COUNCIL.—***Evanturel & Evanturel***, 20 L. C. J., p. 218, 1 Q. L. R., p. 74, 6 P. C., App., p. 1.—Q. B.—16 L. C. J., p. 258.

13. A will made while the testator was laboring under the effects of ***delirium tremens***, of which he died a few days afterwards, held invalid.—Q. B.—***Chapleau & Chapleau***, 1 L. N., p. 473.

14. Eccentricity of conduct merely, not indicative of permanent mental disorder, does not invalidate a will.—LORANGER, J.—***Royal Institution for the Advancement of Learning vs Scott***, 26 L. C. J., p. 247.

15. A long question of facts as to the sanity of the testator, in which the Court of Queen's Bench decided that he was sane and the Supreme Court reversed that decision.—SUPREME COURT.—***Russel & Lefrançois***, 8 S. C. R., 336, C. D., p. 531.—Q. B.—2 Q. B. R., p. 245.

16. Although a donation to a person living in adultery with the donor is null, it is no objection to a bequest or legacy.—PRIVY COUNCIL.—***King & Tunstall***, 20 L. C. J., p. 49, 6 R. L., p. 358, 6 P. C. App. p. 55.

832. The capacity of married women to dispose of property by will is established in the first book of this code, in the title *Of Marriage*.—C. C. 184; C. N., 905. [II. 341.]

833. Minors, [even of the age of twenty years and over,] whether emancipated or not, are incapable of bequeathing any part of their property.—Paris, 293, 294, 296; Ricard, part. 1, n. 160 et seq.; 2 Bourjon, 297; Pothier, *Test.* 334; Guyot, *Test.* 105; C. N. 903, 904; C. S. L. C, c. 34, section 2. [II. 341.]

DECISIONS:—1. A minor of the age of twenty, can bequeath personal property to a tutor.—PRIVY COUNCIL.—***Durocher & Beaubien***, Stuart's Rep., p. 307, A. D. 1828, before Moore's P. C. Rep. commenced.

2. A minor of twenty cannot dispose of his immoveables by will.—Q. B.—***Loranger & Boudreau***, 9 L. C. R., p. 385.

Digitized by Google

834. Tutors and curators cannot bequeath property for the persons under their control, either alone or conjointly with such persons.

Persons interdicted for imbecility, insanity or madness cannot dispose of property by will. The will of a prodigal made subsequently to his interdiction may be confirmed or not according to circumstances and the nature of the dispositions.

A person to whom an adviser has been judicially appointed, whether at his own request or upon an application for his interdiction, may validly dispose of property by will.—Guyot, Rép., vo. *Conseil judiciaire;* Ibid., vo. *Prodigue;* Ibid.. *Interdiction*, p. 703; Anc. Den., *Test.*, 713; *Novel.* 39, de l'Emp. Léon; *Contrà*, Pothier, *Test.* 335; C. N. 901; Thev. d'Ess. (Can. Ed.) p. 31. [II. 341.]

DECISIONS:—See cases noted at C. C. 831.

835. The capacity of the testator is considered relatively to the time of making his will; nevertheless a will made previously to a condemnation from which civil death results, is without effect if the testator die while he is under the effect of such condemnation.—Ricard, part. 1, nn. 797-9; Guyot, *Test.*, 123; Pothier, *Test.*, 332; Thev. d'Ess. (Can. Ed.) *loc. cit.* [II. 341.]

836. Corporations and persons in mortmain can only receive by will such property as they may legally possess. — C. S. L. C., c. 34, s. 3; Thev. d'Ess. (Can. Ed.) p. 36. [II. 341.]

DECISIONS:—See cases noted at C. C., 838.

837. Minors and interdicted or insane persons, though incapable of bequeathing, may receive by will.—Ricard, part. 1, n. 126; 2 Bourjon, 156, 298; Pothier, *Test.*, 337; Guyot, *Légataire*, 45; Thev. d'Ess. (Can. Ed.) *loc. cit.*; C. N., 906. [II. 341.]

838. The capacity to receive by will is considered relatively to the time of the death of the testator; in legacies the effect of which remain suspended after the death of the testator, whether in consequence of a condition, or in the case of a legacy to children not yet born, or of a substitution, this capacity is considered relatively to the time at which the right comes into effect.

Persons benefited by a will need not be in existence at the time of such will, nor be absolutely described or identified therein. It is sufficient that at the time of the death of the testator they be in

Digitized by Google

existence, or that they be then conceived and subsequently born viable, and be clearly known to be the persons intended by the testator. Even in the case of suspended legacies, already referred to in this article, it suffices that the legatee be alive, or conceived, subject to the condition of being afterwards born viable, and that he prove to be the person indicated, at the time the legacy takes effect in his favor.—2 Ricard, *Don.*, 102 ; 2 Bourjon, 299 ; Guyot, *Légataire.* 44-5, 6, 53 ; Thev. d'Ess. (Can. Ed.) *loc. cit.* [II. 341.]

DECISIONS:—1. A devise made to a *bâtard adultérin* not competent by the French law, when the will was made or when the divisor died, to accept such bequest, is good and valid, if it be a conditional one as a *substitution*, and if at the period when the entail took effect,(*à l'ouverture de la substitution*),the disqualification of the devisee has been removed (41 Geo. III, c. 4).—Q. B.—*Hamilton & Plenderleath*, 2 R. de L., p. 1.

2. Under the old law, derived from the Roman law, and subsequently incorporated into the Canadian Code, wherever there is a limitation by way of substitution, the time when the substitution opens is the time with reference to which the capacity of the substitute to take is to be determined.—Privy Council. *King & Tunstall*, 20 L. C. J., p. 49, 6 R. L. p. 358, 6 P. C. App., p. 55.

3. H. F., a merchant in Montreal, devised and bequeathed his residuary estate, by his will dated in 1870, to trustees in trust " to establish at Montreal an " institution to be called the Fraser Institute." In a suit by the respondents, as the heirs and representatives of the testator, to set aside the above disposition it was held that it ought to be sustained. It was a disposition for a lawful purpose within the meaning of art. 869 C. C.; while as to the bequest in favour of a corporation to be thereafter formed, there was no restriction against it to be found in the Code; and as to the devise, the prohibitions contained in art. 366 and 836 of the Code relate to the acquisition of immoveable property by corporations already formed. A devise by which property is given, not to trustees with power of perpetual succession, but simply to trustees directed to convey to a corporation, only in the event of its being lawfully created with permission to possess it. is not within the scope of the said articles. The gift not having been made to a society not in existence at the testator's death, but to intermediate fiduciary legatees whose appointment is permitted by art. 869 of the Code, did not lapse, Under article 838 the capacity of the substituted society to receive is to be considered relatively to the time when the right to receive comes into effect.—Privy Council.—*Abbott & Fraser*, 20 L. C. J., p. 197, 6 R. L, p. 365, 6 P. C. App., p. 96.—Beaudry, J.—15 L. C. J., p. 147.

4. A legacy to a person and her children born and to be born of her marriage, is valid, even as regards children born of that marriage which were neither born nor conceived at the time of the death of the testator.—Papineau J.—*Cupples vs Martin*, 5 L. N., p. 428.

839. As regards testamentary dispositions, the legal presumptions of undue influence and want of will, arising from the relation of priest or minister, physician, advocate or attorney, in which the legatee stands towards the testator, have been destroyed by the in-

Digitized by Google

troduction of the absolute freedom of disposing of property by will. Presumptions in these cases are to be established as in all others.—C. S. L. C., c. 34, s. 1; C. N. 909; Thev. d'Ess. (Can. Ed.) p. 37. [II. 343.]

DECISIONS:—1. A confessor may receive a legacy from his penitent. Any difficulties which may have existed with regard to the confessor in such case under the old French law have been removed by the act 41 Geo. III, c. 4.—TASCHEREAU, J.—*Harper vs Bilodeau*, 11 L. C. R., p. 119.

2. The fact of a legatee being aware that the testator has altered his will in favor of such legatee, is no ground for supposing that undue influence was exerted to induce such alteration.—Where the testator was not interdicted at the time the will was made, and where there is no proof of hallucination, the presumption is that he was of sound and disposing mind.—There is nothing unreasonable or calculated to excite suspicion in the bequest by a testator of *une part d'enfants* to two nieces, who had laboriously tended and nursed him and his wife for several years prior to their decease.—MONK, J.—*Lacombe vs Dambourgès*, 3 L. C. J., p. 10.

3. In this case the will of the testatrix was set aside on the ground of the undue influence of her husband.—Q. B.—*Dorion & Dorion*. 9 R. L., p. 97.

SECTION II.—OF THE FORM OF WILLS.

840. Dispositions in contemplation of death made of a person's whole property, or of part thereof, in legal form by will or codicil, and whether they are expressed in the terms of an appointment of heir, of a gift, of a legacy, or in other terms indicating the intentions of the testator, take effect according to the rules hereinafter laid down, as universal legacies, legacies by general title, or as particular legacies. —Pothier, *Test.*, 314-5; C. N., 967, 1002. [II. 343.]

841. Two or more persons cannot make a will by one and the same act, whether in favor of third persons or in favor of one another. —Ord. des Test., art. 77; Merlin, Rép., vo *Test.*, sec. 1, § 1, art. 1; C. N. 968; *Contrà*, Ricard, p. 345; 2 Bourjon, 311; 17 Guyot, 135. [II. 343.]

842. Wills may be made:

1. In notarial or authentic form;

2. In the form required for holograph wills;

3. In writing and in presence of witnesses, in the form derived from the laws of England.—C. S. L. C., c. 34, s. 3; Ricard, part. 1, nn. 1482-3-4; Guyot, *Test.*, 141; Acte du Canada, 14 Geo. III, c. 3, sec. 10; C. N., 969. [II. 343.]

843. [Wills in notarial or authentic form are received before two notaries or before a notary and two witnesses; the testator, in their presence and with them signs the will or declares that he can-

Digitized by Google

not do so, after it has been read to him by one of the notaries in presence of the other, or by the notary in presence of the witnesses. Mention is made in the will of the observance of the formalities.]—[II. 343 to 345.]

Amendments:—1. Every authentic last will and testament received before one notary and two witnesses, one only of which witnesses could sign his name, since the civil code of Lower Canada came into force, until this act comes into force, shall be held to be valid, and to prove its contents, notwithstanding the defect of this formality, in like manner as if the defect did not exist, provided it does not contain any ground of nullity, other than such defect of form.

2. Every authentic last will and testament received before two notaries, or one notary and two witnesses, without making mention in the instrument that the testator signed in the presence of the notaries or of the notary and the witnesses, and together with them or declared that he could not do so after it had been read to him by one of the notaries in presence of the other, or by the notary in presence of the witnesses, until this act comes into force, shall be considered authentic and valid, notwithstanding this defect of making mention, in the same manner as if mention had been made in the instrument; provided always, that the formalities, the observance of which should have been mentioned, had been really observed.—Q. 38 Vict., cap. 23, ss. 1, 2.

1. Every authentic will, passed before a notary and two witnesses, of whom one only can sign his name, from the coming into force of the Act 38 Vict., chap. 23, up to the coming into force of the present act, shall be considered as valid and as proof of its own contents, notwithstanding such error of form, just as if such error did not exist, provided it contains no other cause of nullity than such error or form.

2. Every authentic will passed before two notaries, or before one notary and two witnesses, without mention having been made in the deed, that the testator signed in presence of the notaries or of the notary and witnesses, and with them, or of his having declared that he was unable to sign after the document has been read to him, by one of the notaries in presence of the other, or by the notary in presence of the witnesses, up to the coming into force of the present act, shall be considered authentic and valid, notwithstanding the omission of such mention, just as if such mention had been made in the deed, provided always that the formalities, the observance of which should have been mentioned, have in reality been observed.

3. The provisions of this act shall not affect pending cases.—Q. 42-43 Vict., cap. 36, ss. 1 to 3.

Digitized by Google

DECISIONS :—1. A certificate of a notary as to the state of mind of a party at the time of making her will, to the effect that she was *saine d'entendement*, is mere matter of style and may be contradicted by parol evidence.—C. R.—*Clarke vs Clarke*, 2 L. C. R., p. 11.

2. The testatrix having caused her will to be prepared by a notary public in pursuance of verbal instructions given by herself, and having afterwards repeated he whole of the contents of the will in the presence of the notary public who prepared it and of the second notary called to witness the execution of the will and having in all other respects observed the formalities prescribed by article 289 of the *Coutume de Paris*, it was held that the will was legally *dicté et nommé* as required by the custom and was a good and valid will and that according to the *Coutume de Paris*, it is not necessary that a will by public act (*testament solennel*) be actually written in the presence of the testatrix and of the two notaries receiving the will.—Q. B.—*Evanturel & Evanturel*, 15 L. C. R., p. 321.

3. A will is not validly executed when the greater portion thereof was prepared and drawn up by a notary out of the presence of the testator and of the second notary called to assist in receiving it and which was not read over twice nor read and repeated to the testator in the presence of the second notary as required by law.—Q. B.—*Bourassa & Bourassa*, 17 L. C. R., p. 299.

4. Le notaire qui reçoit un testament solennel n'est point tenu en Canada de faire mention qu'il a écrit le testament.—SMITH, J.—*Bourassa vs Bédard*, 3 L. C. J., p. 48.

5. Le défaut de mention expresse de la présence des témoins lors de la lecture du testament au testateur, n'entraîne pas la nullité du testament, si d'ailleurs cela appert par équipollence des termes.—C. R.—*Dubé vs Charron*, 5 L.C. J. p. 255.

6. A will, made in solemn form, by a person who could not write or sign his name and who was wholly ignorant of any other language than Gaelic, before a notary who only spoke and understood the French language, and two witnesses, one of whom was wholly ignorant of the French language (in which the will was written) and the other spoke English, French and Gaelic, and acted as interpreter all round, was valid.—C. R.—*Dewar vs McLennan*, 11 L. C. J., p. 196.

But held in Appeal, reversing this judgment.

7. Dans un testament solennel il faut que le notaire et les témoins instrumentaires entendent la langue du testateur et celle dans laquelle le testament est rédigé.—En conséquence, un testament rédigé en français par un notaire qui n'entendait pas le testateur qui ne parlait et n'entendait que le gaélique, en présence de deux témoins dont l'un entendait le gaélique, mais n'entendait pas le français et l'autre servait d'interprète, doit être déclaré faux et nul—Q. B.—*McLennan & Dewar*, 13 L. C. J., p. 102.

8. L'absence de la signature de l'un des témoins instrumentaires n'invalide pas le testament s'il est dit au testament pourquoi il n'a pas signé.—TASCHEREAU, J.—*Vaillancourt vs Lapierre*, 5 R. L., p. 262.

9. Qu'en l'absence d'une inscription en faux, on ne peut attaquer par une preuve testimoniale rien de ce qui concerne la solennité extérieure d'un testament authentique ni contredire les énonciations qui y sont contenues.—TASCHEREAU, J.—*Lériger dit Laplante vs Daigneault*, M. L. R., 3 S. C., p. 444.

844. Authentic wills must be made as originals remaining with the notary.

Digitized by Google

The witnesses must be named and described in the will. They must be of the male sex, of full age, and must not be civilly dead, nor sentenced to an infamous punishment. [Aliens may serve as witnesses.] The clerks and servants of the notaries cannot.

The date and place of its execution must be stated in the will.—[II. 343 to 345.]

DECISION:—1. In a will made in 1852 in English form it was held that a witness of twenty years of age was a competent witness and that the mark of one of the witnesses instead of his signature was sufficient. So might also a will in authentic form be witnessed before the Code.—TASCHEREAU, J.—*Vaillancourt vs Lapierre*, 5 R. L. p. 262.

845. [A will cannot be executed before notaries who are related or allied to the testator or to each other, in the direct line, or in the degree of brothers, uncles, or nephews. The witnesses however may by related or allied to the testator, to the notary, or to one another.] —[II. 343 to 345.]

DECISIONS:—1. La parenté du notaire en second à l'une des parties contractantes n'entraîne pas la nullité de l'acte sous l'empire de notre code civil.—SICOTTE, J.—*Guévremont vs Cardin*, 16 L. C. J., p. 257.

2. Un notaire peut recevoir le testament de son cousin germain. Un testament n'est pas nul, par le seul fait que le notaire qui l'a reçu, était le cousin germain de la légataire universelle.—TASCHEREAU, J.—*Vaillancourt vs Lapierre*, 5 R. L., p. 262.

846. [Legacies made in favor of the notaries or witnesses, or to the wife of any such notary or witness, or to any relation of such notary or witness in the first degree, are void, but do not annul the other provisions of the will.]

Tentamentary executors who are neither benefited nor compensated by the will may serve as witnesses to its execution.—C. Canton de Vaud, 655; see authorities at C. C., 853. [II. 347.]

847. Wills in authentic form cannot be dictated by signs.

[Deaf mutes and others who cannot declare their will by word of mouth, may do so, if they are sufficiently educated, by means of instructions written by themselves and handed to the notary, before or at the execution of the will.

Deaf mutes and such persons as cannot hear the will read, must read it themselves, and aloud, as regards those who are only deaf.

A written declaration that the deed contains the will of the testator and is prepared in accordance with his instructions, may be

Digitized by Google

substituted for the same declaration by word of mouth, when it is required.

Mention must be made of the observance of these exceptional formalities and of their cause.

If the deaf mutes and others cannot avail themselves of the provisions of this article, they cannot make wills in the authentic form.] —[II. 347.]

848. Further and special provisions exist for the district of Gaspe, to remedy the want of notaries for the execution of wills as well as of other acts.

[Saving these provisions of a local nature, ministers of religion cannot replace notaries in the execution of wills; neither can they serve otherwise than as ordinary witnesses.]—Paris, 289; Poth., *Test.*, 300; 4 Geo. IV, c. 15; 3 & 4 Vict., c. 5; C. S. L. C., cap. 38. [II. 347 to 349.]

849. Wills made in Lower Canada or elsewhere by military men in active service out of garrison, or by mariners during voyages, on board ship or in hospital, which would be valid in England as regards their form, are likewise valid in Lower Canada.—Imp. stat., 1 Vict., c. 26, ss. 10, 11; 29 Chs. II, c. 3; 1 Will. IV, c. 20, s. 48; Parsons, *on Wills*, 24-30; C. N., 981. [II. 349.]

850. Holograph wills must be wholly written and signed by the testator, and require neither notaries nor witnesses. They are subject to no particular form.

Deaf mutes, who are sufficiently educated, may make holograph wills, in the same manner as other persons who know how to write.—2 Bourjon, 303; Pothier, *Don. test.*, 297-8; Guyot, Rép., vo. *Test.*, 137-8; 1 Greenleaf, *Evid.*, § 366; C. N., 970. [II. 349.]

DECISIONS:—1. It is essential to the validity of a devise of real estate that the holograph will, in which it is contained, should be entirely written by the testator, and closed by his signature.—COURT OF APPEALS.—*Caldwell & Attorney General*, Stuart's Rep., p. 327.

2. A written will duly executed before three witnesses, may be altered, in its bequests, by cheques signed by the testator during his last illness, and left "as parting gifts," for the parties indicated in them, in the hands of his private secretary.—Probate of a written memorandum of such bequests made by the testator's private secretary, at his request, as his "last bequests," will suffice to entitle the legatees to recover, without obtaining probate of the cheques themselves.—Q. B.—*Colville & Flanagan*, 8 L. C. J., p. 225.

3. A holograph will, on the face of which appear certain over-writings, changes and alterations of an immaterial character, will not be set aside, and

Digitized by Google

specially so in the absence of satisfactory proof that they were made by some person other than the testator.—Q. B.—*Darling & Templeton*, 19 L. C. J., p. 85.

4. On a petition to compel a notary to deliver up a will:—*Held*, that if the paper writing contained in a sealed envelope, purporting to contain a holograph will, be opened by a notary public, and retained by him, after the decease of the testator, such notary cannot keep it on record in his office, but must produce the same before a judge so that probate may be made, and the will is then to remain deposited with the Court of King's Bench, the notary having no authority to unseal such a will, unless in the presence of or by order of the judge.—*Grant vs Greenshields*, Stephen's Digest, vol. I, p. 1322, n. 70.

851. Wills made in the form derived from the laws of England, [whether they affect moveable or immoveable property,] must be in writing and signed at the end with the signature or mark of the testator, made by himself or by another person for him in his presence and under his express direction, [which signature is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced, in presence of at least two competent witnesses together, who attest and sign the will immediately, in presence of the testator and at his request.]

[Females may serve as attesting witnesses and the rules concerning the competency of witnesses are the same in all other respects as for wills in authentic form.]—Imp. Stat., 29 Chas. II, c. 3, s. 5; 2 Glf., n. 676-8; 1 Jarman, 76; 7 L. C. R., p. 280; Lovelass, *Wills*, 315, 316; Imp. Stat., 7 Will. IV; 1 Vict., c. 26; 15-16 Vict., ch. 24. [II. 349, III. 379.]

DECISIONS:—1. Dans un testament fait en 1852 sous la forme anglaise (avant le Code). *Jugé*: Que la marque du testateur est suffisante;—Que la marque d'un des témoins, au lieu de sa signature, ne peut faire invalider le testament;—Que ce testament n'est pas nul, parce qu'un des témoins était cousin germain du testateur et de la légataire universelle;—Que ces témoins peuvent être âgés de moins de vingt ans.—Taschereau, J.—*Vaillancourt vs Lapierre*, 5 R. L., p. 262.

2. Where erasures in a will are found after the death of the testator, the court can hear evidence to show under what circumstances they were made, and, on proof of their having been made after the execution of the will, may order the original words to be restored.—English, H. C. J.—Sir James Hannen.—*Sturton vs Whellock*, 48 L. T., Rep., N. S., p. 237, 6 L. N., p. 319.

3. That when witnesses called to attest the execution of a will, have not signed the same in the presence of the testatrix at the time of the alleged execution, probate thereof will be refused.—Brooks, J.—*re Henderson et al.*, 10 L. N., p. 91.

852. Deaf mutes capable of understanding the meaning of a will and the manner of making one, and all other persons, whether literate or not, whose infirmity has not rendered them incapable of so

Digitized by Google

understanding or of expressing their intentions, may dispose of property by will in the form derived from the laws of England, provided their intention and the acknowledgment of their signature or mark are manifested in presence of witnesses.—Greenleaf, *Evid. loc. cit.* [II. 349.]

853. In wills made in the last mentioned form, legacies made to any of the witnesses, or to the husband or wife of any such witness or to any relations of such witness [in the first degree] are void, but do not annul the other provisions of the will.

The competency of testamentary executors to serve as witnesses to such wills, is subject to the same rules as in wills in authentic form.—Imp. Stat., 25 Geo. II, c. 6 ; 1 Stephen, 575 ; Alnutt, *Practice of Wills*, 93, 170 ; Jarman, *on Wills*, 65 et seq ; Christie, *Precedents of Wills*, 153, 171, 173 ; Parsons, *on Wills*, 19. [III. 351.]

854. In holograph wills, and in wills made in the form derived from the laws of England, whatever comes after the signature of the testator is looked upon as a new act, which in the former case must likewise be written and signed by the testator, or signed only in the latter. In this latter case the attestation of the witnesses must follow each signature of the testator, or come after the last as witnessing the whole of the will preceding such signature.

In wills made in either of the forms mentioned in this article, date and place need not be mentioned on pain of nullity. The judges or courts must decide in each case whether their absence creates any presumption against the will or renders uncertain any of its particular provisions.

The will need not be signed upon each page. — Ricard, part. 1, n. 1491 ; 2 Bourjon, 304 ; Pothier, *Don. test.* 299 ; Guyot, *Test.*, 167, 169, 170 ; Parsons, *on Wills*, 13, 60 ; Jarman, 78, 160. [II. 351.]

855. The formalities to which wills are subjected by the provisions of the present section must be observed on pain of nullity, unless there is some particular exception on the subject.

Nevertheless wills purporting to be made in one form, which are void as such in consequence of the inobservance of some formality, may be valid as made in another form, if they contain all the requisites of the latter.—1 Ricard, part. 1, n. 1617 ; C. N., 1001. [II. 351.]

DECISIONS :—1. The Quebec Act having provided, that every owner of lands, goods or credits, who has a right to alienate the said lands, goods or chattels in his or her life time, may devise or bequeath the same, at his or her death, by his

Digitized by Google

or her last will and testament, such will being executed either according to the laws of Canada, or according to the forms prescribed by the laws of England; *Held*, that a will, invalid according to the French law, and not executed according to the provisions of the Statute of Frauds, so as to pass freehold lands in England, will not pass lands in Canada, although it would pass copyhold or leasehold property in England.—PRIVY COUNCIL.—*Meilklejohn & Attorney General, Stuart's* Rep., p. 581, 2 *Knapps*, P. C., Rep., p. 328.

2. Une disposition dictée par le testateur à un notaire, en la présence de deux témoins, pour être écrite et exécutée comme testament authentique, mais non terminée par le notaire, ni signée par le testateur, en conséquence de sa mort soudaine pendant qu'on écrivait le testament, est nulle et ne peut valoir comme testament nuncupatif ou verbal, suivant la forme anglaise.—Q. B.—*Malo & Migneault*, 2 R. L., p. 186. But held in the Privy Council:—

3. Un testament verbal ou nuncupatif fait en la province de Québec, conformément aux dispositions du statut des Fraudes, 28 Chs. II, chap. 3, avant la promulgation du code civil du Bas-Canada, quant aux meubles du testateur, est valable en loi, en vertu de l'acte de Québec. Un testament commencé sous une forme et nul comme tel, à cause de quelques défauts de formalité, peut valoir comme fait sous une autre forme, s'il a les qualités requises pour cette dernière. —PRIVY COUNCIL.—*Migneault & Malo*, 3 R. L., 606, 16 L. C. J., p. 288, 4 P. C. App. p. 123.

4. Un testament déclaré nul comme testament authentique peut être invoqué et déclaré valable comme testament suivant les lois anglaises.—Q. B.—*Canac & Canac*, 1 Q. L. R., p. 50.

5. A will executed by a notary in the presence of two witnesses, one of whom is under the age of twenty, is not valid as a notarial instrument, but is valid according to English law followed in that respect in Lower Canada, the notary and witnesses in such case being considered as sufficient for the purpose of attesting the execution of the will.—Q. B.—*Lambert & Gauvreau*, 7 L. C. R., p. 277.

See also cases noted at C. C. 851.

SECTION III.—OF THE PROBATE AND PROOF OF WILLS.

856. The originals and legally certified copies of wills made in authentic form make proof in the same manner as other authentic writings.—C. C. 1215. [II. 351.]

857. Holograph wills and those made in the form derived from the laws of England, must be presented for probate to the court exercising superior original jurisdiction in the district in which the deceased had his domicile, or, if he had none, in the district in which he died, or to one of the judges of such court, or to the prothonotary of the district. The court, or judge, or the prothonotary, receives the depositions in writing and under oath of witnesses competent to give evidence, and these depositions remain affixed to the original

Digitized by Google

will, together with the judgment, if it have been rendered out of court, or a certified copy of it, if it have been rendered in court. Parties interested may then obtain certified copies of the will, the proof and the judgment, which copies are authentic and give effect to the will until it is set aside upon contestation.

If the original of the will be deposited with a notary, the court or judge, or the prothonotary, causes such original to be delivered up. —Alnutt, *on Wills*, 618; 41 Geo. III, c. 4, s. 2; C. S. L. C., c. 34, s. 3; Weatherly, *Guide to probate*, 323; Pothier, *Don. test.*, 300; 8 *Encycl. méthod.*, 26; 6 Brillon, p. 661, n. 176; 2 Stephen, 193; Lovelass, *on Wills*, 391, 417; *Dorion & Dorion*, Jugt. in appeal, 1861; C. N., 1007. [II. 351.]

DECISIONS:—1. If a paper writing, contained in a sealed envelope, purporting to contain an holograph will, be opened by a notary public and retained by him after the decease of the testator, such notary cannot keep it on record in his office, but must produce the same before a judge that probate may be made, and the will is then to remain deposited with the records of the Court of King's Bench.—A notary public has no authority to unseal an holograph will unless in the presence and by the order of a judge.—An holograph will of personal and moveable property is valid, by the law of England, and probate may be made thereof according to the Prov. Stat. 41 Geo. III, c. 4.—K. B.—*Ex parte Grant.* Stuart's Rep., p. 60.

2. A will which is intelligible although very ungrammatical and incorrectly spelt, is nevertheless valid.—C. R.—*Robert vs Dorion*, 3 L. C. J., pp. 12, 21.

3. Le mode et la preuve d'un testament verbal ou nuncupatif anglais, n'est pas régi par les lois françaises, ni quant à sa confection, ni quant à la preuve ou vérification (*probate*) qui doit en être faite.—PRIVY COUNCIL.—*Migneault & Malo*, 3 R. L., p. 606, 16 L. C. J., p. 288, 4 P. C. App., p. 123.

4. A judge of the Superior Court for Lower Canada at Montreal has no jurisdiction either to receive the affidavit of the subscribing witness to a will or to grant probate thereof, it appearing that the testator died in the district of Beauharnois and application must be made to a judge or the prothonotary of the Court within the district of Beauharnois.—BADGLEY, J.—*Ex parte Sweet*, 10 L. C. R., p. 451.

5. In an action against executors it appeared that the deceased, on the 4th September 1860, being then on his death bed and having made his will in March previous, stated to his secretary among other things that he was a dying man and requested him to write certain bank cheques payable to certain persons whom he named and to whom he desired to give a token of his regard, and he then signed the cheques so written, which cheques remained in the possession of the secretary until after his death. An action was brought by the plaintiff, an episcopal clergyman in the parish where the deceased resided, to recover the amount of one of the cheques made in his favor for $1000, which had been presented at the bank where it was made payable and had been protested for non-payment. *Held*, that the plaintiff was not entitled to recover as upon a *don manuel* but that the cheque was valid and effectual as a testamentary bequest or disposition —Q. B.—*Colville vs Flanagan*, 14 L. C. R., p. 329.

Digitized by Google

858. The heir of the deceased need not be summoned to the probate thus made of the will, except it is so ordered in particular cases.

The functionary who takes the probate takes cognizance of all that relates to the will.

The probate of wills does not prevent their contestation by persons interested.—Alnutt, *loc. cit.;* Weatherly, 1; 1 Jarman, 22-3; 1 Greenleaf, § 518, 2 do., §§ 691, 692, 344. [II. 353.]

DECISION:—By the uninterrupted practice and usage of the Canadian Courts since 1801, the grant of probate is not of that binding and conclusive character which attaches to it in England, and does not prevent the heirs from impugning the validity of a will in their defence to an action brought by a legatee under the will.—A testamentary paper unfinished and unexecuted, but proved to contain the testator's intentions, will be held valid, if it be shown satisfactorily that the fact of its not being completed was due to some cause other than the testator's abandonment of his intentions, as for instance, his sudden death while the paper was being written from dictation.—The law which introduced into Canada the English law as to wills must be considered as having introduced it with all its incidents, and therefore with the admissibility of oral evidence.—PRIVY COUNCIL.—*Migneault & Malo*, 16 L. C. J., p. 288, 3 R. L., p. 606, 4 P. C. App., p. 123.

859. The acknowledgment of a will by the heir or by any interested person has its effect against him, as regards his right to contest its validity subsequently, but does not prevent the probate and the depositing of the will with the prothonotary in the proper manner, in so far as concerns other parties interested.—C. S. L. C., c. 37, s. 25, § 2; Lovelass, *on Wills*, 418. [II. 353.]

860. When the minute or the original of a will has been lost or destroyed by a fortuitous event, after the death of the testator, or has been withheld without collusion, by an adversary or by a third party, the will may be proved in the manner provided in such case for other acts and writings in the title *Of Obligations.*

If the will have been destroyed or lost before the death of the testator without the fact ever having come to his knowledge, it may be proved in the same manner as if the accident had occurred after his death.

If the testator knew of the destruction or loss of the will and did not provide for such destruction or loss, he is held to have revoked it, unless he subsequently manifests his intention of maintaining its provisions.—C. C. 51, 1217, 1218, 1219, 1233; Troplong, n. 2108; Lovelass, *on Wills*, 342, 350; C. S. L. C., c. 37, sec. 25, § 2. [II. 353.]

DECISION :— For an essay on "Lost Wills," see 9 L. N., p. 69.

Digitized by Google

861. In cases where, in conformity with the preceding article, a non-produced will may be judicially proved, a probate of it may also be obtained, upon petition to that effect and positive proof both of the facts which justify such a proceeding and of the contents of the will. In such case probate of the will is held to be established according to the proof deemed sufficient, and to whatever modifications may be found in the judgment.—Weatherly, 86-7-8; Alnutt, 136; 2 Greenleaf, §§ 688, *a.* 693; 1 Jarman, 136. [II. 355.]

862. The sufficiency of one witness applies to the probate and proof of wills, even of those lost or destroyed, if the court or judge be satisfied.—Alnutt, 170; 2 Greenleaf, § 694. [II. 355.]

SECTION IV.—OF LEGACIES.

§ 1. *Of legacies in general.*

863. Testamentary dispositions of property constitute legacies, either universal, or by general title, or by particular title.—Domat, *Legs*, sec. 1, n. 1; Guyot, *Legs*, 401; Pothier, *Test.*, 315; C. C. 840; C. N., 1002, 1004. [II. 355.]

864. The property of a deceased person which is not disposed of by will, or concerning which the dispositions of his will are wholly without effect, remains in his abintestate succession, and passes to his lawful heirs.—Domat, *Test.*, tit. 1, sec. 9, n. 15, *Legs*, tit. 2; Guyot *loc. cit.*; Lovelass, 394. [II. 355.]

865. When a legacy made subject to another legacy lapses, from a cause dependent upon the legatee, the legacy to which it is thus subject does not therefore lapse, but is deemed to form a distinct disposition, charged upon the heir or legatee to whom the lapsed legacy accrues.—2 Bourjon, 328, and authorities there cited; Pothier, *Test.*, 375-6; Guyot, *Légataire*, 75-6. [II. 355.]

866. The legatee may always repudiate the legacy so long as he has not accepted it. The acceptance may be either express or implied. Acceptance may be implied from the same acts as in abintestate successions. The right to accept a legacy, not previously repudiated, passes to the heirs and other legal representatives of the legatee, in the same manner as heritable rights derived from the law

Digitized by Google

alone.—2 Bourjon, 326-7; Pothier, *Don. Test.*, 397; Guyot, *Légataire*, 55, 56, 60. [II. 355.]

867. Tutors and curators may accept legacies, subject to the same restrictions as in the case of abintestate successions.

The capacity of minors and of persons interdicted for prodigality, to accept legacies for themselves, is governed by the rules established for the acceptance of successions.—Guyot, *Légataire*, 57. [II. 355.]

868. Accretion takes place in favor of the legatees in the case of lapsed legacies, when such legacies are made in favor of several persons jointly.

They are held to be so made when they are created by one and the same disposition and the testator has not assigned the share of each colegatee in the thing bequeathed. Directions given to divide the thing jointly disposed of into equal aliquot shares, do not prevent accretion from taking place.

The legacy is also presumed to be made jointly when a thing which cannot be divided without deterioration is bequeathed by the same act to several persons separately.

The right to accretion applies also to gifts *inter vivos* made in favor of several persons jointly, when some of the donees do not accept.—Domat, *Test.*, tit. 1, sec. 9; 2 Bourjon, 339 et seq.; Pothier, *Don. test.*, 406; Troplong, *Don.*, n. 1789; C. N., 1044, 1045. [II. 355 to 357.]

DECISIONS :—1 Qu'il n'y a pas d'accroissement dans les donations entrevifs lorsque la propriété est donnée; et que même dans les legs, il n'y a accroissement qu'en autant que le testateur n'a pas assigné à chaque légataire sa part dans la chose léguée.—Q. B.—*McDonald & Dodd*, 30 L. C. J., p. 69.

2 See also case noted at C. C., 1276.—Q. B.—*Dubois & Boucher*, 3 Q. B. R., p. 241.

3. Accretion in matters of legacy takes place according to the wish of the testator, as manifested in his will, as a consequence of the power to dispose of property by will. Article 868 C. C., does not confer the right to establish accretion, but merely defines the cases in which the testator is presumed to have intended it to take place.—ANDREWS, J.—*Denis vs Cloutier*, 14 Q. L. R., p. 115.

869. A testator may name legatees who shall be merely fiduciary or simply trustees for charitable or other lawful purposes within the limits permitted by law; he may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees. —2 Ricard, *Subst.*, part. 1, n. 753, and consequence of unrestricted freedom of wills; Thev. d'Ess. (Can. Ed.) p. 163. [II. 357.]

Digitized by Google

Amendment:—See the Act intituled "An Act respecting Trusts."—Q. 42-43 Vict., cap. 29.

See also the Act intituled "An Act to amend the Act respecting "Trusts and the Act defining the investments to be made by admi- "nistrators."—Q. 46 Vict., cap. 24.

DECISIONS:—1. The bequest of a sum of money to trustees, for the benefit of a corporation not *in esse* but in apparent expectancy, is not to be considered a lapsed legacy.—In a similar bequest, to be applied towards defraying the expense to be incurred in the erection and establishment of a university or college upon condition that the same be erected and established within ten years from the testator's decease, such condition is accomplished if a corporate and political existence be given to such university or college by letters patent emanating from the Crown, although a building applied to the purpose of such university or college may not have been erected within that period of time.—COURT OF APPEALS. *Desrivières & Richardson*, Stuart's Rep., p. 218.

2. A devise of real estate to a corporation upon condition that it should, within the period of ten years, erect and establish, or cause to be erected and established, upon the said estate, an university or college:—*Held*, that the words erect and establish, etc., extend only to the erection or establishment of the corporation or body politic, forming the university or college, and not to the erection of a building in which the university or college is to be established.—The condition of a devise to the Royal Institution for the Advancement of Learning, that it should, within ten years, cause to be erected and established an university or college, bearing the testator's name, is accomplished, if an university of royal and not of private foundation, be erected and established within that period.—COURT OF APPEALS.—*Royal Institution for the Advancement of Learning & Desrivières*, Stuart's Rep., p. 224.

3. A bequest in trust is valid in Lower Canada.—C. R.—*Freligh vs Seymour*, 5 L. C. R., p. 492.

4. See case noted in full at C. C. 838.—PRIVY COUNCIL.—*Abbott & Fraser*, 20 L. C. J., p. 197.

870. Payment made in good faith to the ostensible heir, or to a legatee who is in possession of the succession, is valid against the heirs or legatees who present themselves afterwards; saving the recourse of the latter against him who has received without a right to do so.—C. C. 1145; Dargentré, sur 410; Bretagne, glos. 3, n. 1; Pothier, *Obl.*, 503; 7 Toul., nn. 26, 29. [II. 357.]

871. Fruits and interest arising from the thing bequeathed accrue to the benefit of the legatee from the time of the death of the testator, when the latter has expressly declared in the will his intention to that effect.

Life-rents or pensions, bequeathed by way of maintenance, also begin from the date of the testator's death.

Digitized by Google

In all other cases, fruits and interest do not accrue until they are judicially demanded, [or until the debtor of the legacy is put in default.]—*ff* L. 23, *de leg. et fid.*; Ricard, part. 2, n. 99; 2 Bourjon, 334-5; Pothier, *Don. Test.*, 382; Bacquet, c. 8, n. 25; C. N. 1015. [II. 363, III. 379.]

DECISION:—The only condition on which interest can be claimed on special legacies was when a judicial demand had been made, from the date of which demand interest would run.—DAY & MONDELET, JJ.—*Torrance vs Torrance*, M. C. R. p. 119.

872. The rules concerning legacies and the presumptions of the testator's intention, as well as the meaning ascribed to certain terms, give way to the formal or otherwise sufficient expression of such intention, given in another sense or with a view to different effects. The testator may derogate from these rules in all that is not contrary to public order, to good morals, to any law containing a prohibition or some other applicable declaration of nullity, or to the rights of creditors and third persons.—Ricard, *Don.*, part. 2, n. 129; 2 Bourjon, 353; Domat, *Test.*, tit. 1, sec. 6, n. 2. [II. 357.]

DECISIONS:—1. A clause in the will of a testator that a usufruct bequeathed by him in favor of his wife should cease on her remarriage, held not to be *contra bonos mores*.—C. R.—*Forsyth vs Williams*, 1 L. C. R., p. 102.

2. The paramount duties of Courts in construing wills is to ascertain and give effect to the intention of the testator to be collected from the whole will and not from any particular word or expression which may be contained therein.—PRIVY COUNCIL.—*Martin & Lee*, 11 L. C. R., p. 84; 14 Moore P. C. Rep., p. 142.—Q. B.—9 L. C. R., p. 376.

3. When two wills, exact copies of each other, and made at the same time, by husband and wife, contain the same legacy, the legacy is only payable once.—BADGLEY, J.—*Clément vs Leduc*, 1 L. C. J., p. 99.

4. A bequest of a farm with all the stock and implements upon it is a special legacy; to charge the legatee under such a bequest with the debts of the deceased, the burden of proof that the testator had no other estate or effects is upon the plaintiff; in the absence of such proof, parol evidence of a promise by the legatee to pay a debt due by the testator is inadmissible.—C. R.—*McMartin vs Gareau*, 1 L. C. J., p. 286.

5. See also case noted at C. C. 831, n. 7.—PRIVY COUNCIL.—*Renaud & Guillet dit Tourangeau*, 2 P. C. App., p. 4.

6. An error in the name of the legatee does not annul the disposition of the will by which the legacy is bequeathed, when the person intended to be benefited is indicated beyond reasonable doubt.—MACKAY, J.—*Lane vs Taylor*, 4 L. N., p. 386.

7. With regard to interpretation of wills, see also case noted at C. C. 880 and 1234.—MATHIEU, J.—*DeSalaberry vs Faribault*, 11 R. L., p. 621.

Digitized by Google

§ *2. Of universal legacies and legacies by general title.*

873. Universal legacies are testamentary dispositions by which the testator gives to one or to several persons the whole of the property he leaves at his death.

Legacies are only by general title when the testator bequeaths an aliquot part of his property, as a half, a third, or a universality, such as the whole of his moveable or immoveable property, or the whole of the private property excluded from the matrimonial community, or an aliquot part of any such whole.

All other legacies are by particular title.

The exception of particular things, whatever may be their number or value, does not destroy the character of universal legacies, or of legacies by general title.—Domat, *Legs*, tit. 2 ; Guyot, *Légataire*, 42-3 ; Pothier, *Test.*, 315 ; Proudhon, *Usuf.*, nn. 1025, 1844, 1845 ; C. C., 780, 801 ; 1 Ricard, part. 3 ; n. 1527 ; C. N., 1003, 1010. [II. 357.]

DECISION:—By the appointment under the will of a person named as residuary legatee, such legatee is seized of the estate of the testator after the death of his executors and is entitled to recover Bank stock held in the name of the deceased executors and also the dividends on such stock.—Q. B.—*Bank of Montreal & McDonnell*, 14 L. C. R., p. 482.

874. The legatee has the same delays as the heir to make an inventory and to deliberate. If he have not assumed his quality within the delays, and be afterwards sued for the debts or charges attached to his legacy, he is not freed from the costs by his renunciation any more than the heir would be.—Consequence of assimilating legatees to heirs. [II. 357.]

DECISION:—Des héritiers poursuivis pour qu'un jugement soit déclaré exécutoire contre eux peuvent renoncer à la succession, même le jour fixé pour l'audition, s'ils n'ont pas fait acte d'héritier, mais en ce cas ils paieront les frais.—TORRANCE, J.—*Mulholland vs Halpin*, 5 R. L., p. 184.

875. The liability of a universal legatee, or of a legatee by general title, or by particular title, for the debts and hypothecs, is explained in the title *Of Successions*, and, in certain respects, in the present section, and also in the title *Of Usufruct*. [II. 357.]

DECISIONS:—1. Qu'une partie défenderesse condamnée comme usufruitière universelle de son mari décédé, est dans la même condition qu'un légataire universel et est personnellement obligée au paiement de la condamnation.—Que la donation universelle en usufruit par contrat de mariage est une donation *causa mortis*.—Q. B.—*Hudon & Painchaud*, 24 L. C. J., p. 268.

2. Que le légataire ou donataire universel en usufruit est tenu personnellement, vis-à-vis des créanciers, des dettes de la succession, même des capitaux, et

Digitized by Google

que la contribution aux dites dettes par les nu-propriétaires, dans les proportions fixées par la loi, doit être établie entre eux et l'usufruitier, ne regarde pas les créanciers et n'empêche pas leur recours. (C. C. 474 & 735.)—TASCHEREAU, J.—*Boileau vs Seers*, M. L. R., 1 S. C., p. 239.

876. The legatee of a usufruct bequeathed as a universal legacy, or as a legacy by general title, is personally liable towards the creditors for the debts of the succession, even for the principal, in proportion to what he receives; he is hypothecarily liable for whatever claims affect the immoveables included in his share, as any other legatee by the same title, and with the same recourse. The valuation is made proportionately between him and the proprietor in the manner and according to the rules set forth in article 474.—*ff* L. *ult.*, *De usu. et usuf*; Lacombe, vo. *Usufruit*, sec. 2, n. 15; Guyot, Rép., vo. *Usufruit*, 396; *Contrà*, as to capital sums, the commentators upon the new French law. See particularly 10 Demolombe, nn, 523, 543, 604; Proudhon, *Usufruit*, nn. 475, 1859, 1889. [II. 357 to 359.]

877. A testator may change, among his heirs and legatees, the manner and proportions in which the law holds them liable for the payment of the debts and legacies, without prejudice to the personal or hypothecary action of the creditors against those who are legally subject to the right claimed, and saving the recourse of the latter against those upon whom the testator imposed the obligation.—1 Ricard, part. 2, nn. 18, 52, 306; Guyot, vo. *Légataire*, p. 100; 2 Ricard, *Disp. Condit.*, n. 214. [II. 359.]

878. [Universal legatees and legatees by general title cannot, after acceptance, free themselves from personal liability for the debts and legacies imposed upon them by law or by the will, without having obtained benefit of inventory; they are in this respect, and in all that concerns their administration, the rendering of their account and their discharge from liability, subject to the same rules as the heir, and to the obligation of registering.

Legatees by particular title upon whom the will imposes debts and charges of uncertain extent, may, in the same manner as the heir and universal legatee, accept only under benefit of inventory.]—2 Bourjon, 324-5; Guyot, vo. *Légataire*, 94-5; Ricard, part. 3, n. 1506, 1509, 1517, 1519. [II. 359.]

879. The creditors of a succession have a right to the separation of property against a legatee liable for a debt, in the same

Digitized by Google

manner as against an heir, for the portion in which he is liable.—C. S. L. C., c. 37, s. 27, § 3.—Consequences of C. C. 891. [II. 359.]

§ 3.—*Of legacies by particular title.*

880. The debts of a testator must in all cases be paid in preference to his legacies.

Particular legacies are paid by the heirs, or universal legatees, or legatees by general title, each in the proportion for which he is liable, as in the contribution to the debts, and the legatee has a right to demand the separation of property.

If the legacy be imposed upon one particular heir or legatee, the personal action of the legatee by particular title does not extend to the others.

The right to a legacy does not carry with it a hypothec upon the property of the succession, but the testator, whatever may be the form of the will, may secure it by a special hypothecation requiring, as regards the rights of third parties, that the will be registered.—Pothier, *Don.*, 353, 370-3; 2 Voët, liv. 20, n. 27; Brillon, vo. *Legs*, n. 112; C. S. L. C., c. 37, ss. 1, 25; Troplong, *Don.*, nn. 1793 and notes, 1928-9; 2 Bourjon, 323, 325; C. N., 1017; Thev. d'Ess. (Can. Ed.), pp. 24-26. [II. 359 to 361.]

DECISIONS:—1. Que les créanciers d'une succession insolvable ont droit d'être payés de leurs créances sur et à même les biens de la succession par préférence aux légataires particuliers de ces biens.—Q. B.—*Banque Ville Marie & Viger*, 30 L. C. J., p. 143.

2. The creditors of a deceased debtor having a right to the separation of property of estate from that of heirs and legatees (C. C. 743), particular legatees can only obtain the immediate payment of their legacies by disinteresting the creditors or by giving security.—Q. B.—*Viger & Robitaille*, 4 Q. B. R., p. 372.

3. Qu'un legs particulier fait en ces termes:— "Je donne et lègue, en outre "à la dite S., épouse du dit L., la somme de $10,000 cours actuel, qui lui sera "payée par mon légataire universel ci-après nommé, $4,000 en parts de la Banque "Jacques Cartier, $4,000 en parts de la société de Construction Canadienne de "Montréal, $1,000 en parts de la Banque du Peuple, $500 en parts de la Banque "d'Hochelaga et $500 en obligations solvables, de celles qui se trouveront dans "ma succession au moment de mon décès, ou en argent courant, au choix de, "mon dit légataire universel," est valablement acquitté par le transport d'actions indiquées dans le legs, à la valeur nominale des actions, et que le légataire universel n'est pas tenu de donner à la légataire particulière, la différence entre la valeur réelle de $10,000 et la valeur vénale des dites actions ou parts de banques, mais que le légataire universel est tenu de payer en parts de banques ou en argent, de sorte que, s'il n'y a pas assez dans la succession de parts de banque indiquées dans le testament, il doit parfaire le legs en argent.—MATHIEU, J.—*De-Salaberry vs Faribault*, 11 R. L., p. 621.

Digitized by Google

881. [The bequest of a thing which does not belong to the testator, whether he was aware or not of another's right to it, is void, even when the thing belongs to the heir or legatee charged with the payment of it.

The legacy is however valid, and is equivalent to the charge of procuring the thing or of paying its value, if such appear to have been the intention of the testator. In such case, if the thing bequeathed belong to the heir or the legatee charged with the payment of it, whether the fact was known or not to the testator, the particular legatee is seized of the ownership of his legacy.] 1 Ricard, part 3, n. 282-4-5, 291 et seq.; 2 Bourjon, 351-2; Pothier, *Test.*, 363-5; Lacombe, *Legs*, part 2, s. 2; 2 Despeisses, pl. 288 et seq., nn. 3, 4; C. N., 1021. [II. 361.]

882. [If the thing bequeathed belonged to the testator for a part only, he is presumed to have bequeathed only the part which belonged to him, even when the remainder belongs to the heir or principal legatee, unless his intention to the contrary is manifest.]

The same rule applies to the bequest made by one of the consorts of a thing belonging to the community; saving the right of the legatee to the whole of the thing bequeathed under the circumstances enumerated in the title concerning marriage covenants, and generally in the case of the following article.—Ricard, part. 3, nn. 282-4-5, 291 et seq.; 2 Bourjon, 351-2; Pothier, *Test.* 363-4-5; Lacombe, vo. *Legs.* part. 2, s. 2; 2 Despeisses, p. 288 et seq., nn. 3. 4; C. N., 1021. [II. 361.]

DECISION:—A devise by the husband of the share of the community belonging to his wife, under a condition to pay her a life rent, is valid if she accept of the condition attached to such devise.—Q. B.—*Roy & Gagnon*, 3 L. C. R., p. 45.

883. [If the testator since the making of the will have become, wholly or in part, owner of the thing bequeathed, the legacy is valid as regards whatever remains in his succession, nothwithstanding the provisions contained in the preceding article; excepting the case in which the thing remains in the succession only by reason of the nullity of a subsequent voluntary alienation of it by the testator.] C. N., 1021. [II. 363.]

884. When a legacy by particular title comprises a universality of assets and liabilities, as for example a certain succession, the legatee of such universality is held personally and alone for the debts connected with it, without prejudice to the rights of the creditors against the heirs and universal legatees, or legatees by general title,

Digitized by Google

who have their recourse against the particular legatee.—Proudhon, *Usufruit*, nn. 1025 et seq., 1845 et seq. [II. 363.]

885. In the case of insufficiency of the property of the succession or of the heir or legatee liable for the payment, the legacies entitled to preference are paid first, and the remainder is then divided rateably among the other legatees in proportion to the value of their respective legacies. Legatees of a certain and determinate object take it without being bound to contribute to the payment of the other legacies which have no preference over theirs.—Ricard, part. 3, n. 1530; 2 Bourjon, 322-3-4-5; Pothier, *Don. test.*, 352 et seq.; Guyot, *Légataire*, 85, 96, 100. [II. 363.]

DECISION:—In the present cases there were sufficient assets in the estate to pay the legacies. A case of facts.—Q. B.—*Newman & Newman*, 3 Q. B. R., p. 137.

886. To obtain the reduction of particular legacies, the creditors must first have discussed the heir or legatee who is personally bound, and have availed themselves in time of the right to separation of property.

The creditors exercise this reduction against each of the particular legatees for a share only, in proportion to the value of his legacy, but the particular legatees may free themselves by giving up the particular legacies or their value.—Authorities under the preceding article. [II. 363.]

DECISION:—Le créancier d'un testateur qui a discuté les biens de la succession, sans avoir été payé, peut poursuivre un légataire particulier d'un immeuble, pour qu'il soit tenu de le rapporter et de le délaisser en justice, si mieux il n'aime payer la créance du demandeur.—En ce cas le défendeur qui a fait des impenses pour lesquelles il a une créance privilégiée sur l'immeuble dont on lui demande le délaissement, n'a pas le droit de retenir l'immeuble jusqu'à ce qu'il ait été payé de ses impenses, mais il peut exercer sa créance privilégiée sur le prix de l'immeuble qui devra être vendu sur un curateur au délaissement, dans le cas où le défendeur ne se prévaudrait pas de l'option qui lui est offerte de payer la créance du demandeur.—Q. B.—*Matte & Laroche*, 8 R. L., p. 517.

887. Creditors of the succession, in the case of reduction of particular legacies, have a preferable right to the thing bequeathed, over the creditors of the legatee, as in the case of separation of property.

A particular legatee suffering such reduction has his recourse against the heirs or legatees who are personally liable, and is substituted by law in all the rights of the creditor thus paid.—Guyot, *Légataire*, 97; 2 Bourjon, 323, 232-3. [II. 363.]

Digitized by Google

888. When an immoveable bequeathed has been increased by further acquisitions of property, the property thus acquired, even if it be contiguous, is not deemed to form part of the legacy, unless from its destination and the circumstances it may be presumed that the testator intended it to form a mere dependency, constituting with the immoveable bequeathed but one and the same property.

Buildings, embellishments and improvements are deemed to be adjuncts of the thing bequeathed.—Pothier, *Don. test.*, 379; 2 Bourjon, 338; 1 Thév.-Dess., *Dict. du Dig.*, 494; C. N., 1019. [II. 363.]

889. [If before or since the will, the immoveable bequeathed have been hypothecated for a debt of the testator remaining still due, or even for the debt of a third person whether it was known or not to the testator, the heir, or the universal legatee, or the legatee by general title is not bound to discharge the hypothec, unless he is obliged to do so by the will.]

A usufruct establised upon the thing bequeathed is also borne without recourse by the particular legatee. The same rule applies to servitudes.

If however the hypothecary debt of a third person, of which the testator was ignorant, affect at the same time the particular legacy and the property remaining in the succession, the benefit of division may reciprocally be claimed.—*ff* L. 57, L. 69, § 3, *de legatis et fidei.*, lib. 1; 2 Bourjon, 332; Pothier, *Don. test.*, 377; Guyot, *Légat.*, 97; C. N., 1020. [II. 365.]

DECISIONS:—1. When a testator does not expressly direct a particular legatee to discharge a hypothec on an immoveable devised to him, article 889 C. C. does not bear the interpretation that such particular legatee is liable for the payment of such hypothecary debt, without recourse against the heir or the universal legatee.—SUPREME COURT.—*Harrington & Corse*, 9 S. C. R., p. 412, 28 L. C. J., p. 139, 6 L. N., p. 138, 7 L. N., p. 408, C. D., p. 531.—Q. B.—5 L. N., p. 148.

2. Que le légataire particulier, en l'absence de demande de réduction par les créanciers du testateur, n'est ni tenu ni obligé au paiement des dettes de celui-ci, pas même de celles dues par hypothèques sur les immeubles à lui légués, et que le légataire universel est seul tenu et obligé au paiement des dites dettes.—Q. B.—*Penisson & Penisson*, 9 Q. L. R., p. 122.

890. A legacy made in favor of a creditor is not deemed to be in compensation of his claim, nor that in favor of a servant in compensation of his wages.—*ff* L. 28, L. 29, *de legatis et fidei;* Ricard, part. 2, n. 168; 2 Bourjon, 360; Guyot, *Légataire*, 102-3; C. N., 1023. [II. 365.]

DECISIONS:—1. The legacy in usufruct by a man to his wife does not make the latter lose her recourse against her husband or his heirs for *reprises matrimo-*

Digitized by Google

niales and confusion does not exist in such case.—Q. B.—*Ménédier & Gauthier*, 16 L. C. R., p. 181.

2. When a creditor leaves a legacy to a debtor, the presumption is that he intends the amount of the bequest to be paid without deduction of the debt.—Badgley, J.—*MacBean & Dalrymple*, 1 L. C. L. J., p. 62.

3. Le légataire d'une somme annuelle, de la nature d'aliments, qui doit lui être payable jusqu'au partage définitif de la succession, peut refuser de compenser cette somme annuelle avec ce qu'il doit à la succession.—En tel cas, le rapport de ce qu'il doit à la succession ne doit se faire que lors du partage définitif de cette succession.—Privy Council.—*Muir vs Muir*, 5 R. L., p. 637, 5 P. C. App., p. 66.

§ 4. *Of the seizin of legatees.*

891. Legatees by whatever title, are, by the death of the testator, or by the event which gives effect to the legacy, seized of the right to the thing bequeathed, in the condition in which it then is, together with all its necessary dependencies, and with the right to obtain payment, and to prosecute all claims resulting from the legacy, without being obliged to obtain legal delivery.—C. S. L. C., c. 34, s. 2. Thev. d'Ess. (Can. Ed.) p. 24. [II. 365, III. 379.]

DECISIONS;—1. An executor, after the expiration of his executorship and account rendered, cannot be sued *en délivrance de legs*.—Q. B.—*Gotron & Corrivaux*, 1 R. de L., p. 379.

2. When the testator by his will disposes of the whole of his estate and succession and leaves legacies to his heirs, it is not necessary for them to renounce his succession; and their action *en délivrance* must be brought against the executor of the will, whose duty it is, if there be other heirs, to call them into the suit.—K. B.—*Gesseron vs Canac*, 1 R. de L., p. 379.

3. The debtor sued by the heir of his creditor cannot oppose in his own name to such demand a will of the creditor bequeathing this debt to a third party, notwithstanding the notice given to the said debtor by the executor that he would demand such bequest. In such case, in the absence of *délivrance de legs*, the heir may receive the amount of the debt and give therefor a good and valid discharge.—C. R.—*Deneau vs Frothingham*, 3 L. C. R., p. 145.

4. Since the passing of the Act 41 Geo. III, cap. 4, the *délivrance de legs* required by the French law under the operation of the *Coutume de Paris* has ceased to be necessary.—Q. B.—*Blanchet & Blanchet*, 11 L. C. R., p. 204.

5. L'effet d'un legs universel est tel qu'aucune demande en délivrance de legs n'est nécessaire.—C. R.—*Robert vs Dorion*, 3 L. C. J., p. 12.

6. Aucune action en délivrance de legs contre les héritiers d'un testateur ne peut être portée, ou est nécessaire, si le testateur a disposé de toutes ses propriétés par testament.—Q. B.—*Webb & Hall*, 15 L. C. R., p. 172.

7. The usufructuary and not the person who has the *nue propriété*, must sue to recover the legacy from the *détenteur*.—C. R.—*Kimber vs Judah*, M. L. R., 2 S. C., p. 86.

8. An usufructuary who does not allege either that she is in possession of the usufruct or that she has made an inventory as required by article 463 C. C.,

Digitized by Google

cannot by an action recover a debt due to the estate of which she has been left the usufruct.—C. R.—*Abercromby vs Chabot*, 7 Q. L. R., p. 371.

9. Joint usufructuaries of shares in a Bank can sue the Bank direct for their dividends, without being obliged to cause the executors of the will constituting the usufruct to intervene.—C. R.—TASCHEREAU, J.. *loq.*—*Gray vs Quebec Bank*, 5 Q. L. R., p. 94.

10. Que les exécuteurs testamentaires seuls, et non les légataires universels, sont tenus et ont le droit de fournir une reddition de compte à des légataires à titre universel (C. C. 918).—Q. B.—*Taché & Taché*, 14 R. L., p. 257.

11. Where the Appellant sought to have her proportion of certain shares in the capital stocks of the bank, respondents, and which were bequeathed to her by will, placed in her own name, and the Respondents refused to do so alleging that, without the knowledge and consent of the executors and trustees, they could not legally transmit or allow to be transmitted to the plaintiff her proportion of the said shares, the Court ordered that the executors and trustees aforesaid be brought into the case at Appellant's diligence and costs.—Q. B.—*Woolrich & Bank of Montreal*, 28 L. C. J., p. 314.

SECTION V.—OF THE REVOCATION AND LAPSE OF WILLS AND LEGACIES.

892. Wills and legacies cannot be revoked by the testator except:

1. By means of a subsequent will revoking them either expressly or by the nature of its dispositions;

2. By means of a notarial or other written act, by which a change of intention is expressly stated;

3. By means of the destruction, tearing or erasure of the holograph will, or of that made in the form derived from the laws of England, deliberately effected by him or by his order, with the intention of revoking it; and in some cases by reason of the destruction or loss of the will by a fortuitous event becoming known to him, as explained in the third section of the present chapter.

4. By his alienation of the thing bequeathed.—*ff* L. 3, § 11, L. 15, L. 16, *de adimendis vel transf.*; Pothier, *Test.*, 386-391; Ricard, part. 3, nn. 121-6, 134, 239, 262, 273, 274 et seq.; 2 Bourjon, 381-6, 397-8; Troplong, *Don.*, nn. 2048, 2107 et seq.; C. N., 1035. [II. 365.]

DECISION:—1. A testator may revoke his will by any writing signed by him. Such writing need not be written by him, nor possess the formalities of a will.—C. R.—*Fisher vs Fisher*, 1 L. C. J., p. 88.

2. The testator had $5,000 of Bank stock, and by his will, he bequeathed $1,000 of it to his grand-daughter. Subsequently he bequeathed, by three separate codicils, $3,000 of said stock to the same grand-daughter and two legacies of $1,000 each of said stock to other legatees, thus disposing of all the $5,000 of

Digitized by Google

stock. *Held*:—That as the legacies in the codicils disposed specifically of the whole $5,000 of stock, they operated a revocation of the first bequest of $1,000 to the grand-daughter, contained in the will.—Q. B.—*Pattison & Fuller*, M. L. R., 2 Q. B., p. 349.

893. The revocation of a will or of a legacy may also be demanded: 1. On the ground of the complicity of the legatee in the death of the testator, or by reason of grievous injury done to his memory, in the same manner as in the case of legal succession, or, if the legatee hindered the revocation or modification of the will; 2. By reason of the resolutive condition;

Without prejudice to the causes for which the validity of the will or legacy may be impugned.

The subsequent birth of children to the testator does not effect a revocation.

[Enmity springing up between him and the legatee does not establish a presumption of revocation.]—Ricard, part. 3, nn. 688 et seq.; 2 Bourjon, 396, 403-4; Pothier, *Test.*, 388-396; *contrà en partie*, 387; C. S. L. C., c. 34, s. 2; C. N., 1046, 1047. [II. 367.]

DECISION:—The birth of a posthumous child revokes the will of its father partially.—*Hanna vs Hanna*, Stuart's Rep., p. 103.

894. Subsequent wills which do not revoke the preceding ones in an express manner, annul only such dispositions therein as are inconsistent with or contrary to those contained in the later wills.—Ricard, part. 3, nn. 148-9; 2 Bourjon, 312, 358-9, 385, 395; Pothier, *Test.*, 386, 390, 404 et seq.; C. N., 1036. [II. 367.]

895. A revocation contained in a subsequent will retains its full effect, although such will should remain inoperative by reason of the incapacity of the legatee or of his refusal to accept.

A revocation contained in a will which is void by reason of informality, is also void.—Ricard, part. 3, nn. 168-9; 2 Bourjon, 393; Pothier, *Test.*, 388, 389, 390; C. N., 1037. [II. 367.]

896. In the absence of express dispositions, the circumstances and the indications of the intention of the testator determine whether, upon the revocation of a will which revokes another will, the former will revives.—2 Bourjon, 390; Troplong, *Don.*, 2065; *Contrà*, Ricard, *Don.*, part. 3, n. 178. [II. 367.]

DECISION:—La révocation d'un second testament n'a pas l'effet de faire revivre un testament précédent, si l'acte de révocation n'en contient pas une

Digitized by Google

disposition expresse ou que cela ne résulte pas des circonstances sous lesquelles cette révocation a eu lieu.—C. R.—*Dupuis vs Dupuis*, 14 L. C. J., p. 242.

897. [Every alienation by the testator of the right of ownership in the thing bequeathed, even in a case of necessity, or by forced means, or with right of redemption reserved, or by exchange, carries with it, unless he has otherwise provided, a revocation of the will or legacy for all that has been thus disposed of, even though, if it were voluntary, the alienation be void.]

The revocation subsists although the thing should afterwards have returned into the hands of the testator, [unless he appears to have intended the contrary.]—Ricard, part 3, n. 262 et seq.; 2 Bourjon, 398-9; Voët, P. *de adim. leg.* n. 6; Pothier, *Test.* 390-1; 2 Pand. 431, n. 8; Troplong, *Don.* 2095; C. N., 1038. [II. 369.]

DECISIONS:—1. Que le legs de deux seigneuries fait en vertu du testament de feu Alexandre Fraser, en 1833, est devenu caduc par la vente qu'en a faite le testateur, vu qu'il n'est pas prouvé que cette vente ait eu lieu dans un cas d'urgente nécessité ou sous l'empire d'un besoin pressant.—Q. B.—*Fraser & Pouliot*, 13 R. L., p. 520.—CARON, J.—13 R. L., p. 1.

2. That when a testator exchanged a property that he had previously bequeathed by his will, even not *ex necessitate* but *non cum animo mutandi*, the legacy was not revoked, but the property received in exchange passed to the legatee.—SUPREME COURT.—*Jones & Fraser*, 12 Q. L. R., p. 327, 10 L. N., p. 11, 13 S. C. R., p. 342.

898. A person cannot, otherwise than by the effect of gifts in contemplation of death made by contract of marriage, forego his right to dispose of his property by will or by gift in contemplation of death, or to revoke his testamentary dispositions. Nor can a person subject the validity of any future will to formalities, expressions or signs not required by law, or to other derogatory clauses.—Pothier, *Test.*, 392-3; Ord. des Test., art. 76; Henrys, liv. 5, c. 2, quest. 13; Ricard, *Don.*, part. 3, nn. 74 et seq.; 2 Bourjon, 380; *Contrà*, Papon, liv. 20, tit. 1, art. 4-5; Observations sur Henrys, *loc. cit.*, nn. 8 et seq.; Arrêts cités par Ricard, *loc. cit.* [II. 369.]

899. [Heirs cannot be excluded from successions, unless the act excluding them is clothed with all the formalities of a will.]—[II. 369.]

900. Every testamentary disposition lapses if the person in whose favor it is made do not survive the testator.—Ricard, part. 2, n. 56; 2 Bourjon, 393-4; Pothier, *Test.*, 394; C. N., 1039. [II. 369.]

Digitized by Google

901. Every testamentary disposition made under a condition which depends on an uncertain event, lapses if the legatee die before the fulfilment of the condition.—Pothier, *Test.*, 394, 395; 2 Bourjon, 394; C. N., 1040. [II. 369.]

902. Conditions which are intended by the testator to suspend only the execution of a disposition, do not prevent the legatee from having an acquired right transmissible to his heirs.—Pothier, *Test.*, 368; 2 Bourjon, 371; C. C., 1089; C. N., 1041. [II. 369.]

DECISION:—Qu'un legs d'une rente annuelle, dont la moitié seulement est payable pendant la minorité du légataire et dont l'autre moitié doit être capitalisée et payée, avec le total de la rente, à l'âge de majorité du légataire, est un legs à terme, et un droit acquis, transmissible aux héritiers.—TASCHEREAU, J.—*Prescott vs Thibault*, M. L. R., 1 S. C., p. 187.

903. A legacy lapses if the thing bequeathed perish totally during the lifetime of the testator.

The loss of a thing bequeathed which happens after the death of the testator falls upon the legatee, except cases wherein the heir or other holder may be responsible according to the rules applicable generally to things which form the subject of obligations.—Ricard, part. 3, nn. 314 et seq.; 2 Bourjon, 399, 400, 402; Pothier, *Test.*, 397 et seq.; Lacombe, *Legs*, sec. 16; C. C., art. 1049, 1050, 1063, 1064, 1065, 1067, 1068; C. N., 1042. [II. 369.]

904. A testamentary disposition lapses when the legatee repudiates it or is incapable of receiving under it.—Ricard, part. 3, n. 416; 2 Bourjon, 339; Pothier, *Test.*, 387, 395, 396; C. N., 1043. [II 369.]

SECTION VI.—OF TESTAMENTARY EXECUTORS.

905. A testator may name one or more testamentary executors, [or provide for the manner in which they shall be appointed; he may also provide for their successive replacement.]

Heirs or legatees may lawfully be appointed testamentary executors.

Creditors of the succession may be executors without forfeiting their claims.

Single women or widows may also be charged with the execution of wills.

Digitized by Google

The courts and judges cannot appoint nor replace testamentary executors, [except in the cases specified in article 924.]

If there be no testamentary executors, and none have been appointed in the manner in which they may be, the execution of the will devolves entirely upon the heir or the legatee who receives the succession.—Ricard, *Don.*, part. 2, nn. 63, 64, 67; Guyot, vo. *Exéc. test.*, p. 158; Pothier, *Test.*, p. 359; 2 Bourjon, 373-4; *Cas de la succession Normandeau, à Montréal, quant à la nomination par la cour; contrà, le très ancien droit français; Contrà, quant aux créanciers sous la loi anglaise:* Parsons: *on Wills*, 87; C. N., 1025. [II. 371.]

906. Married women cannot accept testamentary executorship without the consent of their husbands.

Single women and widows who marry while they are testamentary executors, do not forfeit their office by mere operation of law, even though they have entered into community of property with their husbands, but they require the consent of the latter to continue the exercise of such office.

A testamentary executrix separated as to property from her husband, either by contract of marriage or by judgment, may, if he refuse the consent necessary for her to accept or to exercise the office, obtain judicial authorization as in the cases provided for in article 178.—Ricard, *Don.*, part. 2, n. 67; Pothier, *Test.*, p. 359; Guyot, Rép., *loc. cit.;* 2 Bourjon, 373; Brillon, vo. *Exéc. test.*, n. 13; C. N., 1029. [II. 371.]

907. Minors cannot act as testamentary executors, even with the authorization of their tutors.

Nevertheless emancipated minors may do so, provided the executorships be of small importance in proportion to their means.—Pothier, *Test.*, 360; C. N., 1030. [II. 371.]

908. The incapacity of corporations to execute wills is declared in the first book.

Persons who compose a corporation, or such persons and their successors, may be appointed to execute wills in their purely personal capacity, and may act in that behalf if such appear to have been the intention of the testator, although he may have designated them solely by the appellation which belongs to them in their corporate capacity.

Digitized by Google

The same rule applies to persons designated by the title which belongs to their office or position, and to their successors.—Ricard, *Don.*, part. 2, nn. 69, 70; Pothier, *Test.*, 368. [II. 373.]

909. Subject to the preceding provisions, persons who cannot obligate themselves cannot be testamentary executors.—Ricard, *Don.*, part. 2, n. 68; Pothier, *Test.*, 359; Guyot, Rép., vo. *Exéc. test.*, 158; C. N., 1028. [II. 373.]

910. No person can be compelled to accept the office of testamentary executor.

Its duties are performed gratuitously, unless the testator has provided for their remuneration.

If a legacy made in favor of a testamentary executor have no other cause than such remuneration, and he do not accept the office, the legacy lapses by reason of the failure of the condition.

If he accept the legacy thus made, he is presumed to have accepted the executorship.

Testamentary executors are not bound to be sworn; nor to give security, unless they have accepted with that condition.

They are not liable to coercive imprisonment.—Cod., L. 3, *de condition. insert*; Ricard, *Don.*, part. 2, n. 95; Bacquet, *Bâtardise*, c. 7, n. 14; 4 Furgole, *Test.*, 156; Pothier, *Test.*, 359, 366; Guyot, Rép., vo. *Exéc. test.*, 159; Lacombe, *eod. verbo*, n. 13; Merlin, Rép., vo. *Cont. par corps*, § 5, *in fine*; *Contrà*, as to coercive imprisonment; Papon, liv. 20, tit 9, n. 10, note; but, in any case, abrogated by Ord. 1667, tit. 34, art. 1. [II. 373.]

DECISIONS:—1. The administration of a testamentary executor is a mandate of a private character, which can only be delegated by the testator, and is not a trust of public nature, which can be imposed by a judge.—COURT OF APPEALS.—*Gugy & Gilmor*, 1 R. de L., p. 169.

2. Hypothecation is only created on the real estate of an executor from the time of his acceptance by authentic *acte* of the executorship.—This acceptance must be registered to enable a party claiming under the will to rank by privilege on the estate of the executor over an ordinary mortgage creditor whose claim has been duly registered.—C. R.—*David vs Hays*, 3 L. C. R., p. 440.

3. A mortgage on the lands of an executor does not date from the registration of the will but from the date of the registration of an authentic *acte* showing that he accepted the executorship.—DAY, J.—*Lamothe vs Hutchins*, 9 L. C R., p. 7.

4. No *hypothèque* attaches to the property of an executor, by reason of the registration of the will under which he is appointed.—DAY, J.—*Lamothe vs Ross*. 2 L. C. J., p. 278.

Digitized by Google

911. A testamentary executor who has accepted the office cannot renounce it [without the authorization of the court or of a judge, which may be granted for sufficient cause; the heirs and legatees and other executors, if there be any, being present, or having been duly called.

Difference of opinion between an executor and the majority of his co-executors, as to the execution of the will, may constitute a sufficient cause.]—Parsons, *on Wills*, 102 et seq.; Guyot, *Exéc. test.*, 159; Nouv. Deniz., vo. *Exéc.*, 209, 220. [II. 373.]

DECISIONS:—1. The testamentary executor who has accepted the office, can renounce it on the authorization of a judge for sufficient cause; the heirs and legatees, and other executors, being present or duly called.—MONK, J.—*Yule vs Graithwaite*, 12 L. C. J., p. 207.

2. Des exécuteurs testamentaires peuvent renoncer à leur charge avant l'an et jour du consentement des légataires, et alors ceux-ci peuvent porter une action réelle. L'article 911 n'est que dans l'intérêt des légataires.—*Lamontagne et Dufresne*, M., 15 juin 1874. (DeBellefeuille's Code annoté at art. 911.)

912. If several testamentary executors have been appointed, and some of them only, or even one of them alone, have accepted, they or he may act alone, unless the testator has otherwise ordained.

In like manner, if several have accepted, but some or one only of them survive, or retain the office, they or he may act alone until the others are replaced, in the cases admitting of it, unless the testator has expressed himself to the contrary.—Bacquet, *Bâtardise*, c. 7, n. 9; Ricard, part. 2, n. 65; 2 Bourjon, 374. [II. 373.]

DECISION:—The testator named two executors or trustees and the survivor of them for the administration of all his property until a partition. *Held:* that one of the executors having renounced to the execution of the will, the other had *saisine* of the testators succession to carry his will into effect.—COURT OF APPEALS —*Viger & Pothier*, Stuart's Rep., p. 394.

913. If there be several joint testamentary executors, with the same duties to perform, they have all equal powers and must act together, unless the testator has otherwise ordained.

[Nevertheless if any of them be absent those who are in the place may perform alone acts of a conservatory nature and others requiring dispatch.]

The executors may also act generally as attorneys for each other, unless the intention of the testator appears to the contrary, and subject to the responsibility of the one who grants the power. The executors cannot delegate generally the execution of the will to others than their co-executors, but they may be represented by attorney for determinate acts.

Digitized by Google

Executors exercising these joint powers, are jointly and severally bound to render one and the same account, unless the testator has divided their functions and each of them has kept within the scope assigned to him.

They are responsible only each for his share for the property of which they took possession in their joint capacity, and for the payment of the balance due, saving the distinct liability of such as are authorized to act separately.—Chopin sur Paris, liv. 2, tit. 7, n. 4 ; Guyot, Rép., v. *Exéc. test.*, n. 106 ; Lacombe, *Exéc. test.*, n. 15 ; Parsons, *on Wills*, 91, 95 ; N. Den., *Exécut.*, 234 ; *contrà* 2 Bourjon, 378, et Mornac there cited ; C. N., 1033. [II. 375.]

DECISIONS :—1. All joint executors (who have acted) must in an action of account against them, be made parties to the suit and be jointly summoned.—K. B.—*Dame vs Gray*, 1 R. de L., p. 352.

2. It is not competent for one of the joint executors to bring an action without the consent of his co-executors. Supposing such executor to proceed without the concurrence of his co-executor, he must do so in his own name alone.—C. R. —*Clément vs Geer*, 4 L. C. R., p. 103.

3. Executors are not liable, jointly and severally, for the payment of the balance of moneys collected by them, but are only liable each for the share of which he had possession.—Executors are not liable to pay more than six per cent interest on the moneys collected by them, after their account has been demanded, in the absence of proof that they realized a greater rate of interest by the use of such moneys.—Supreme Court.—*Darling & Brown*, 21 L. C. J., 125, 1 S. C. R., p. 360.

4. Action by appellant against defendant Hagar to recover amount of note payable to his own order and endorsed by him to late Clark Fitts. Two of the executors of Fitts intervened and contested the demand alleging Mr. Fitts had never transferred the note to appellant who had obtained it by fraud.—On this contestation the action was dismissed.—The question that arises is: can two out of three executors intervene and contest the action when the third refuses to do so? *Held:* in the affirmative by S. C.—Judgment reversed, but on other grounds. *Jacquays & Hagar*, M., 17 mars 1875. DeBellefeuille's Code annoté, at art. 913.

5. Executors are only responsible for what they actually receive and are not jointly and severally liable for each other's administration.—Q. B.—*Miller & Coleman*, 25 L. C. J., p. 196, 4 L. N., p. 268.

6. That where power was given by a will to two executors to sell immovable property belonging to the estate, a sale by two of the executors to one of themselves was void.—Privy Council.—*Carter & Molson*, 8 L. N., p. 281, 10 App. Cas., p. 664, R. A. C., p. 889.—Q. B.—3 Q. B. R., p. 279.

7. Que les exécuteurs testamentaires conjoints, qui ont pris indivisément possession des biens de la succession, non seulement doivent un seul et même compte, mais sont solidairement tenus au paiement de son reliquat.—Casault, J. —*Hoffman & Pfeiffer*, 7 Q. L. R., p. 125.

See also case noted at C. C. 917, n. 10.—Q. B.—*French & McGee*, M. L. R., 2 Q. B., p. 59.

Digitized by Google

914. The expenses incurred by the testamentary executor in the fulfilment of his duties are borne by the succession.—Pothier, *Test.*, 366 ; Ricard, part. 2, n. 96 ; 2 Bourjon, 378 ; N. Den., *Exécut.*, 223, 233 ; C. N., 1034. [II. 375.]

DECISION :—The general powers of an executor include the engagement of clerks to keep the books of the estate and to carry on its affairs. These general powers are not restricted by the fact that the executor has received a legacy under the will, unless it be apparent, from the terms thereof, that the legacy was intended as compensation for special services.—Q. B.—*Young & Rattray*, 8 L. N., p. 10, 12 Q. L. R., p. 168.—Supreme Court.—C. D., p. 85.

915. A testamentary executor may, before the probate of the will, perform acts of a conservatory nature or which require dispatch, provided he obtains such probate without delay, and furnishes proof of it when required.—Parsons, *on Wills*, 88 ; 2 Bourjon, 379 ; 8 N. Den., 222. [II. 375.]

916. The testator may limit the obligation incumbent upon the executor of making an inventory and rendering an account of his administration, and even free him from it entirely.

This discharge does not release him from the payment of what remains in his hands, unless the testator intended to leave him the disposition of the property without responsibility, or to constitute him legatee, or that the terms of the will otherwise import the release from payment.—Ricard, *Don.*, part. 1, nn. 589, 765 ; part. 2, nn. 70, 90, 91, 92 ; Bacquet, *Bâtard.*, c. 7, n. 18 ; Pothier, *Test.*, 365, appears to be against waiving the making of an inventory, but our law as to wills removes all doubt. [II. 375.]

DECISION :—Although the executor, under the terms of the will, was invested with the most extended powers of administration and exonerated from the obligation of making an inventory, and of accounting, yet when he, in his quality of such executor, endorsed accommodation notes, signed by one of his children, and the bank, in whose favor it was given, attempted to execute judgment against the estate, there being a clause in the will declaring the estate *insaisissable*, an opposition to the execution having been fyled, it was sustained. —Supreme Court.—*Lionais & Molson Bank*, 10 S. C. R., p. 526, C. D., p. 532.—Q. B.—26 L. C. J., p. 271.

917. [If, having accepted, a testamentary executor refuse or neglect to act, or dissipate or waste the property, or otherwise exercise his functions in such a manner as would justify the dismissal of a tutor, or if he have become incapable of fulfilling the duties of his office, he may be removed by the court having jurisdiction.]—8 N. Den., 213. [II. 375 to 377.]

Digitized by Google

DECISIONS:—1. Where an executor whose powers have been extended by the testator beyond a year and a day, has become insolvent and is making away with the estate, the court will interfere to deprive him of the control of the property and oust him from his office.—The court has no power to appoint a sequestrator.—C. R.—*Mackintosh vs Dease*, 2 L. C. R., p. 71.

2. An executor and trustee, under a will made before the passing of the Civil Code, may be removed from office for any of the causes stated in C. C. 917, and a sequestrator appointed to administrate the estate of the testator until another executor and trustee be appointed.—In the present case, the act of maladministration complained of, was the making of a loan without security.—RAINVILLE, J.—*Howard vs Yule*, 25 L. C. J., p. 22, 4 L. N., p. 126.

3. An isolated act of maladministration is not sufficient to warrant the removal of an executor from office.—JETTÉ, J.—*Devine vs Griffin*, 25 L. C. J, p. 249, 4 L. N., p. 61.

4. A sequestrator may be appointed *pendente lite*, in an action to remove executors under a will for mal-administration.—Q. B.—*Brooke & Bloomfield*, 23 L. C. J., p. 140, 6 R. L., p. 533.

5. In the present case there was not sufficient cause shown for the removal of the executor from office.—TORRANCE, J.—*Gingras vs Brillon*, 3 L. N., p. 183.

6. That the refusal of an executor to allow his co-executor to take an equal share in the management of the estate; his applying the proceeds of a cheque to other purposes than that for which his co-executor had signed it; his payment to himself of his own charges against the estate, without the sanction of his co-executor and his enmity to the universal legatee, are sufficient grounds for removal under C. C. 285 & 917.—C. R.—*Seed vs Tait*, 9 Q. L. R., p. 145.

7. An executrix appointed her husband her attorney to manage the estate, and he made a lease which, in the opinion of the court, was disadvantageous to the estate and for the purpose of deriving an unfair advantage, and also received *bonuses*, on several occasions, without accounting for them. *Held:* Sufficient ground for removal of the executrix from office.—Q. B.—*Ross & Ross*, 7 L. N., p. 65.—SUPREME COURT.—C. D., p. 172.

8. Qu'un exécuteur testamentaire sera destitué s'il est prouvé qu'il agit contre les intérêts de la succession à laquelle il a été nommé exécuteur testamentaire.—C. R.—*Mitchell vs Mitchell*, 15 R. L., p. 167, 31 L. C. J., p. 178.

9. That a testamentary executor whose administration exhibits dishonesty or bad faith may be removed from office.—Dishonesty on the part of the executor is shown in the present case (*a*) by his placing obstruction in the way of the administration of the estate to favor another estate in which he has a quarter interest; (*b*) by concealing from his co-executor a debt due by him to the estate; (*c*) by pleading in defence to an action by the estate that he had been party to an evasion of the law, which plea, if successful, would destroy a security given to the estate.—C. R.—*Mitchell vs Mitchell*, M. L. R., 3 S. C., p. 31. (Carried to the Supreme Court.)

10. Where testamentary executors transfer the control of the estate to another person, who paid the moneys belonging to it into a Bank in his own name, and afterwards withdrew them, it was held, that the court below exercised a proper discretion in removing the executors from office, even without evidence of fraudulent intention or actual dissipation of the property.—Q. B.—*French & McGee*, M. L. R., 2 Q. B., p. 59.

Digitized by Google

11. Que des prêts amplement garantis faits, l'un à un des légataires en usufruit pour lui permettre de faire un voyage que requiert sa santé et que lui prescriveraient ses médecins, et l'autre à la mère des légataires pour réparer une propriété appartenant à elle et à tous les légataires moins un, quoiqu'ils ne soient pas l'emploie des deniers spécifiés dans le testament, ne sont pas, en l'absence d'une preuve qu'ils eussent pu être avantageusement placés de la manière voulue par le testateur, une cause de destitution.—CASAULT, J.—*Chouinard vs Chouinard*, 13 Q. L. R., p. 275.

918. Testamentary executors, for the purposes of the execution of the will, are seized as legal depositaries of the moveable property of the succession, and may claim possession of it even against the heir or legatee.

This seizin lasts for a year and a day reckoning from the death of the testator, or from the time when the executor was no longer prevented from taking possession.

When his duties are at an end, the testamentary executor must render an account to the heir or legatee who receives the succession, and pay him over the balance remaining in his hands.—Ricard, *Don.*, part. 2, nn. 71, 72, 74, 76; Pothier, *Test.*, 360-366; 2 Bourjon, 374-7-78; N. Den., 211-3-4, 230; C. N., 1026, 1031. [II. 377.]

DECISIONS:—1. An executor after the expiration of his executorship and account rendered, cannot be sued *en délivrance de legs*.—K. B.—*Gotron vs Corrivaux*, 1 R. de L., p. 379.

2. An action directed against an executor, to recover moneys received by him on account of the estate must be in the form of an action to account, even though the plaintiff claims but one sum as due to the estate.—DRUMMOND, J.—*McPhee vs Woodbridge*, 1 L. C. L. J., p. 86.

3. When a petition for an alimentary allowance is presented during the pendency of an action to account against an executor, the court will grant such allowance notwithstanding the declaration of the executor that he has no funds in his hands.—C. R.—*Hart vs Molson*, 4 L. C. R., p. 127.

4. In an action by a curator to a vacant estate of a testator against the representatives of one of three joint executors for a specific amount of interest received by such executor, it was held in the Court of Appeal that the action was properly dismissed by the court below on the ground that, if the legal representatives of the testator had any claim, it must be urged against all three executors or their representatives for the gestion of the estate generally and not for a specific sum of money.—Q. B.—*McPhee & Woodbridge*, 16 L. C. R., p. 157.

5. Action by an heir-at-law against the executors to render an account of their administration. The executors plead that the whole of the estate, moveable and immoveable, was bequeathed to J. *en usufruit*, and that the heir-at law, the plaintiff in the court below, was present at the *délivrance* and sanctioned this proceeding. The court below condemned the executors to render an account, but the court of appeals were unanimously of opinion that the article of our Code did not apply and that the executors could not be compelled to render

Digitized by Google

any account to the heir-at-law under the peculiar circumstances of the case.—Q. B.—*Bossé & Hamel*, 3 R. C., p. 43.

6. Des exécuteurs testamentaires peuvent renoncer à leur charge avant l'an et jour du consentement des légataires, et alors ceux-ci peuvent porter une action réelle. L'article 911 n'est que dans l'intérêt des légataires.—*Lamontagne & Dufresne*, M., 15 juin 1874. DeBellefeuille's Code annoté at art. 918.

7. An action against an executor to render an account is only prescribed by the lapse of thirty years.—SUPREME COURT.—*Darling & Brown*, 1 S. C. R., p. 360, 21 L. C. J., p. 169.—Q. B.—21 L. C. J., p. 92.

8. Qu'un exécuteur testamentaire a la saisine légale de tous les biens meubles délaissés par le testateur, lors de son décès, même à l'encontre du légataire particulier de ces biens meubles, et qu'une assurance sur la vie est un bien meuble, et comme tel est payable à l'exécuteur testamentaire et non au légataire d'icelle.—JETTÉ, J.—*Archambault vs Citizens Insurance Co.*, 24 L. C. J., p. 293, 3 L. N., p. 416.

9. Qu'en droit, l'exécuteur testamentaire est saisi comme dépositaire légal, pour les fins de l'exécution du testament, des biens meubles de la succession et qu'il peut en revendiquer la possession, même contre l'héritier et le légataire. Dans l'espèce, l'exécuteur pouvait enlever au tuteur des héritiers mineurs la possession du mobilier de la dite succession.—Q. B.—*Normandeau & McDonnell*, 30 L. C. J., p. 120.

10. See case noted at C. C. 891.—Q. B.—*Woolrich & Bank of Montreal*, 28 L. C. J., p. 214.

11. Que quoique l'exécuteur testamentaire ne doive un compte aux héritiers ou légataires que lorsque ses fonctions ont cessé, cependant, lorsqu'il est mis en possession de tous les biens du testateur et que ses pouvoirs sont continués pendant un long espace de temps, il doit leur fournir, à leur demande et à leurs frais, des états de compte et leur permettre l'examen des pièces justificatives, mais que, à cet effet, il ne doit pas des frais.—Que l'exécuteur testamentaire, qui a été nommé en remplacement d'un autre ne doit pas un compte de l'administration de son prédécesseur et que ce compte ne peut être que de celui qu'il a remplacé, ou de ses héritiers ou successeurs.—C. R.—*Quinn vs Fraser*, 10 Q. L. R., p. 320.

12. Que les exécuteurs testamentaires seuls, et non les légataires universels, sont tenus et ont le droit de fournir une reddition de compte à des légataires à titre universel. (C. C. 891).—Q. B.—*Taché & Taché*, 14 R. L., p. 257.

13. Que l'arrivée de l'évènement indiqué par le testateur comme terme à l'exécution de son testament y met fin, lors même que les exécuteurs n'ont pas pu compléter ce dont ils paraissent avoir été chargés.—CASAULT, J.—*Chouinard vs Chouinard*, 13 Q. L. R., p. 275.

14. Qu'une personne tenue de rendre compte de son administration peut faire son compte sous seing privé, en brevêt ou portant minute devant un notaire, à son choix, et en charger le coût dans son compte.—PAPINEAU, J.—*Mayer vs Léveillé*, M. L. R., 3 S. C. p. 190.

15. Que l'exécuteur testamentaire est saisi comme dépositaire légal pour les fins de l'exécution du testament des biens meubles de la succession, et peut en revendiquer la possession, même contre l'héritier et le légataire, à la charge de rendre compte lorsque ses fonctions ont cessé.—TELLIER, J.—*Kerry vs Merchant Bank*, 32 L. C. J., p. 121.

Digitized by Google

919. The testamentary executor must cause an inventory to be made after notifying the heirs, legatees and other interested persons to be present. He may however perform immediately all acts of a conservatory nature or which require dispatch.

He attends to the obsequies of the deceased.

He procures the probate of the will and its registration when necessary.

If the validity of the will be contested he may become a party to support it.

He pays the debts and discharges the particular legacies, with the consent of the heir or of the legatee who receives the succession, or, after calling in such heir or legatee, with the authorization of the court.

In the case of insufficiency of moneys for the execution of the will, he may, with the same consent, or with the same authorization, sell moveable property of the succession to the amount required. The heir or legatee may however prevent such sale by tendering the amount required for the execution of the will.

The testamentary executor may receive the debts due and may sue for their recovery.

He may be sued for whatever falls within the scope of his duties, saving his right to call in the heir or the legatee.—Ricard, part. 2, nn. 79, 80, 81, 86, 87, 88, 94 ; Pothier, *loc. cit.;* 2 Bourjon, 376, 8 ; N. Den., 228 ; C. N. 1031. [II. 377.]

Amendment : See the Acts intituled " An Act for the more advantageous disposal of property in the hands of administrators."—Q. 33 Vict. cap. 19 ; " An Act respecting trusts."—Q. 42-43 Vict. cap. 29 ; " An Act defining the investments to be made by administrators." Q. 42-43 Vict. cap. 30 ; " An Act to amend the Act respecting trusts and the Act defining the investments to be made by administrators." Q. 46 Vict. cap. 24. (Noted at C. C. 294.)

DECISIONS :—1. If a testator directs his executor to pay his debts, an action may be maintained against him by a creditor of the estate.—K. B.—*Bernier vs Bossé*, 1 R. de L., p. 349.

2. An action can be maintained by the creditor of a testator deceased against his executor for a debt, if by his will, the executor is charged with the payment of the debts of the testator.—K. B.—*Iffland vs Wilson*, 1 R. de L., p. 350.

3. The executors of a testator have no quality to make a *reprise d'instance*, if such *instance* relates to real property.—K. B.—*Hamilton vs Plenderleath*, 2 R. de L., p. 1.

4. An executor, if he sells an estate of the testator, may warrant the title in his own name.—K. B.—*Baley vs Measam*, 2 R. de L., p. 337.

Digitized by Google

5. An action for a *dette mobilière* will not lie against a testamentary executor alone but the heirs or other personal representatives of the testator must be joined in the suit, although the executor was directed by the will to pay the debts and although the action was commenced within the year of the death of the testator.—The plea of the executor that he has no part of the estate of the testator in his hands will be maintained, although the action be instituted within three months of the death of the testator.—TASCHEREAU, J.—*Caspar vs Hunter*, 14 L. C. R., p. 198.

6. An action against executors and universal legatees to enforce a clause of a will made in the following terms: "My desire also is that the mortgage now "subsisting against Mrs. Hawley's (the plaintiff's) property be paid from and out "of the money now in bank to my credit" will be maintained, and a condemnation pronounced against the defendants to pay the amount of the mortgage to the plaintiff, she having been obliged to pay it herself to the mortgagee.—MONK, J.—*Jones vs Penn*, 15 L. C. R., p. 92.

7. A creditor who obtains judgment against a universal legatee and joint testamentary executor cannot later proceed against the other testamentary executor for the same debt, even if he should not have been paid by the universal legatee, if he have not alleged the insolvency of the latter.—C. R.—*Horsack vs Young*, 15 L. C. R., p. 500.

8. A testamentary executor may be sued alone for the recovery of the *dettes mobilières* of the testator. The duty of the testamentary executor thus sued is to notify the heir of the demand, if there be any doubt, so that he may admit or contest it.—Q. B.—*Delery & Campbell*, 16 L. C. R., p. 54.

9. The executors only, and not the usufructuary under the will, can take proceedings to support the rights of the estate.—BADGLEY, J.—*Johnson vs Aylmer*, 1 L. C. L. J., p. 67.

10. Executors empowered to act beyond the year and day and until the provisions of the will are fully executed, cannot claim to have the legatees, usufructuary or in property, impleaded with them.—Q. B.—*Gray & Dubuc*, 2 Q. L. R., p. 234.

11. In an action for the recovery of a legacy, the heirs may be joined with the testamentary executor, as defendants.—LORANGER, J.—*Royal Institution for the Advancement of Learning vs Scott*, 5 L. N., p. 375.

12. Que les débiteurs poursuivis par les exécuteurs testamentaires ont droit d'opposer les exceptions et défenses qu'ils auraient pu faire valoir à l'encontre des légataires eux-mêmes.—C. R.—*Gray vs Quebec Bank*, 5 Q. L. R., p. 92.

13. Que l'exécuteur testamentaire à qui le testateur a donné le droit de disposer d'une manière absolue des biens de la succession, a le droit d'endosser des billets promissoires comme tel exécuteur testamentaire, surtout, si cet endossement est fait en faveur d'un des légataires mentionnés au testament.—RAINVILLE, J.—*Banque du Peuple vs Lionais*, 12 R. L., p. 61.

14. Que l'insolvabilité ou l'insuffisance de la succession du testateur ne peut être alléguée en défense à une action intentée par un légataire ou un créancier, contre les exécuteurs testamentaires.—RAINVILLE, J.—*McGrath vs Graham*, 12 R. L., p. 607.

15. A legatee is entitled to a judgment against the executor of a will, *ès-qualité*, for the full amount of his legacy, even if it be proved that the estate is not able to pay, in full, the demands on it. The question of sufficiency, or

Digitized by Google

insufficiency, of the assets would only properly come up on the execution of the judgment.—Q. B.—*Newman & Newman*, 3 Q. B. R., p. 137.

16. Universal legatees must pay the debts of the testator notwithstanding that he has appointed executors.—Q. B.—*Rolland & Beaudry*, 2 L. N., p. 171, 23 L. C. J., p. 255.

17. An inventory made by a testamentary executor or universal legatee in perfect good faith (*sincérement et loyalement*) is not invalidated by the omission of unimportant formalities. (See case at C. C. 922.)—Jetté, J.—*Archambault vs Citizens Insurance Co.*, 24 L. C. J., p. 293, 3 L. N., p. 416.

920. The powers of a testamentary executor do not pass by mere operation of law to his heirs or other successors, who are however bound to render an account of his administration, and of whatever they may themselves have actually administered. — Pothier, *Test.*, 367-8; 8 Nouv. Den., p. 220, n. 10; 2 Bourjon, 374; C. C., 1043 et seq.; C. N., 1032. [II. 377.]

921. The testator may modify, restrict or extend the powers, the obligations and the seizin of the testamentary executor, and the duration of his functions. He may constitute the testamentary executor and administrator of his property, in whole or in part, and may even give him the power to alienate it with or without the intervention of the heir or legatee, in the manner and for the purposes determined by himself.—Pothier, *Test.*, 365, appears to be greatly, against such extension of powers, but the introduction of absolute freedom in wills and its consequences, appear to have abolished all doubt. See also Nouv. Den., pp. 215 et seq.; 4 Furgole, 147; Guyot, Rép. vo. *Exéc. test.*, 161; and more particularly 2 Delvincourt, p. 373, *note.* [II. 377.]

922. A testator cannot appoint tutors to minors, nor curators to persons requiring their assistance or to substitutions.

If he have assumed to appoint persons to such offices, the specific powers given to the persons thus named, and which he might have conferred upon them without such designation, may however be exercised by them as executors and administrators of the will.

The testator may oblige the heir or the legatee, in certain cases, to take the advice or to obtain the sanction of the testamentary executors, or of other persons—.[II. 379.]

DECISION:—That C. could not, by her will, appoint the appellant tutor to her husband's will. That although the appellant was never duly appointed tutor to the respondent, he was nevertheless accountable to her in the same manner as

Digitized by Google

if he had been regularly appointed as her tutor, he having acted as such under the directions of her mother's will.—Q. B.—*Miller & Coleman*, 2 Q. B. R., p. 33.

923. The testator may provide for the replacing of testamentary executors and administrators, even successively and for as long a time as the execution of the will shall last, whether by directly naming and designating those who shall replace them himself, or by giving them power to appoint substitutes, or by indicating some other mode to be followed, not contrary to law.—Authorities under art. 921. [II. 379.]

924. [If the testator desire that the appointment or the replacement should be made by the courts or judges, the powers necessary for such purpose may be exercised judicially, the heirs and legatees interested being first duly notified.

When testamentary executors and administrators have been named by the will, and, in consequence of their refusal to accept, or of their powers having ceased without their being replaced, or of unforeseen circumstances, none of them remain, and it is impossible to replace them under the terms of the will, the judges and the courts may likewise exercise the powers necessary to do so, provided it appears that the testator intended the execution and administration of the will to continue independently of the heir or of the legatee.]—[II. 379.]

DECISIONS:—1. Les dispositions de l'article 924 du code civil, au sujet de la nomination d'un administrateur testamentaire pour remplacer ceux qui ont cessé d'exercer leurs pouvoirs, ne s'appliquent pas aux cas qui peuvent se présenter sous les dispositions d'un testament fait antérieurement à la promulgation du Code Civil.—Torrance, J.—*Chalut vs Persilier*, 17 L. C. J., p. 44.

2. Que lorsque, dans un testament qui a reçu son exécution par la mort du testateur avant la mise en force du Code Civil, le testateur a exprimé la volonté que l'exécution du testament fût continuée jusqu'à l'arrivée d'un évènement déterminé et que les exécuteurs sont morts sans se donner les successeurs que les testateurs les avaient chargés de nommer, le tribunal ou le juge peut, en vertu du pouvoir qui leur en confère 924 C. C. et sans donner à cet article un effet rétroactif, nommer un exécuteur pour continuer l'exécution du testament.—Casault, J.—*Chouinard vs Chouinard*, 13 Q. L. R., p. 275.

Digitized by Google

CHAPTER FOURTH.

OF SUBSTITUTIONS.

SECTION I.—RULES CONCERNING THE NATURE AND FORM OF SUBSTITUTIONS.

925. There are two kinds of substitution:

Vulgar substitution is that by which a person is called to take the benefit of a disposition in the event of its failure in respect of the person in whose favor it is first made.

Fiduciary substitution is that in which the person receiving the thing is charged to deliver it over to another either at his death or at some other time.

Substitution takes its effect by operation of law at the time fixed upon, without the necessity of any delivery or other act on the part of the person charged to deliver over.—Thévenot-d'Essaules, *Substit.*, nn. 7, 10, 11, 31, 190, 502, 612, 613, 614; 2 Bourjon, 153-4; Pothier, *Substit.*, 485-6; Guyot, *Substit.*, 453; C. N., 896, 897, 1048; Thév. d'Ess. (Can. Ed.) 4, 8, 144. [II. 379.]

DECISIONS:—1. A. bequeathed property to B. with substitution at B.'s death in favor of his eldest son, and his eldest son died, without issue, before B. himself. *Held*, that B.'s surviving son, although his second in point of birth, was entitled to claim under the substitution as the eldest son and that the sale of the property in question by B. and his deceased eldest son was null and void *quoad* the claim of the surviving son of B. under the substitution, the substitution not being open until the death of B.—Q. B.—*McCarthy & Hart*, 9 L. C. R., p. 23.

2. Dans l'espèce, l'intention de la testatrice était de créer une substitution fidéicommissaire, non de créer un simple usufruit en faveur de la donataire, avec donation de la nue propriété à d'autres.—Q. B.—*Joseph & Castonguay*, 1 R. L., p. 200.

926. Fiduciary substitutions include vulgar substitutions without any expressions to that effect being necessary.

Whenever the vulgar is expressly joined to the fiduaciary, to meet particular cases, the substitution is called compendious.

When the term *substitution* is used alone, it applies to the fiduciary, with the vulgar attached to it, unless the nature or terms of the disposition indicate the vulgar alone.—Thév.-d'Ess. nn. 1234 et seq.; Ord. des Substit., tit. 1, art. 27; 2 Bourjon, 174; Pothier, *Subst.* 485-6; Guyot, *Subst.* 507; Thev. d'Ess. (Can. Ed.) 9, 12, 389, 390. [II. 379 to 381.]

Digitized by Google

927. The person charged to deliver over is called the institute, and the one who is entitled to take after him is called the substitute. When there are several degrees in the substitution, the substitute who receives under the obligation of delivering over becomes in turn an institute with regard to the substitute who comes next.—2 Bourjon, 155-9; Pothier, *Subst.*, 486; Guyot, *Subst.*, 475-6; Thev. d'Ess. (Can. Ed.) 13. [II. 381.]

928. A substitution may exist although the term *usufruct* be used to express the right of the institute. In general the whole tenor of the act and the intention which it sufficiently expresses are considered, rather than the ordinary acceptation of particular words, in order to determine whether there is substitution or not.—Thév.-d'Ess., nn. 259, 263, 269; Pothier, *Subst.*, 497, 508; Guyot, *Subst.*, 491; Thev. d'Ess. (Can. Ed.) 69. [II. 381.]

DECISIONS:—1. The words "*jouissance*," "*usufruit*," used in a donation as describing the rights intended to be conveyed to a donee, may be construed to mean the rights to be enjoyed by a person *grevé de substitution*, if the general purport of the deed of donation indicates the intention of the donor to create a substitution, and not merely to transfer to one person the *usufruit* and to another the *nue propriété*.—Q. B.—*Joseph & Castonguay*, 8 L. C. J., p. 62.

2. La disposition testamentaire en question contient non pas une substitution, mais une donation d'usufruit en faveur des enfants de la testatrice, et de la propriété des immeubles en faveur des petits-enfants vivant au jour du décès de la dernière des usufruitières. Dans le cas du décès de l'une des usufruitières, sa part d'usufruit accroît à l'usufruitière survivant. A compter du jour du décès de la testatrice jusqu'à celui de la dernière usufruitière, la nue propriété des dits immeubles résidait sur la tête des héritiers en loi de la testatrice. Les seuls petits-enfants vivant au jour du décès de la dernière usufruitière sont légataires en propriété par têtes ou parts égales, sans égard aux souches. Les arrière-petits-enfants, vivant au jour du décès de la dernière usufruitière, viennent au partage par représentation au cas du prédécès des petits-enfants, leur père ou mère.—MACKAY, J.—*Roy vs Gauvin*, 3 R. L., p. 444.

3. F. X. Désève lègue à Marg. Lenoir, son épouse, tous ses biens à titre de constitut et précaire pour en jouir sa vie durant en usufruit, la dispensant de faire inventaire; et arrivant son décès, il lègue à F. Desève, un de ses fils, sa terre des Tanneries pour en jouir sa vie durant, et *après son décès* il lègue cet immeuble aux enfants du dit F. Desève en propriété. Quant à ses autres biens le testateur les léguait en usufruit seulement à F. X. Desève, prêtre, Elie Desève et Alex. Desève; et au décès de ses trois fils, il donnait ses biens en toute propriété à leurs enfants et, à défaut d'enfants, à leurs plus proches héritiers. Les appelants sont les enfants d'Elie Desève décédé. F. X. Desève est décédé sans enfants.—*Jugé:* 1. que ce testament contient une substitution et non un legs d'usufruit et legs de propriété; 2. que la substitution s'est ouverte à la mort de chaque enfant et qu'il n'y a pas eu d'accroissement en faveur du survivant; 3. que le partage doit se faire par souches et non par têtes.—*Desève & Desève*, M., 17 juin 1875. **Noted** in DeBellefeuille's *Code Annoté* at C. C. 928. 22

Digitized by Google

4. In the present case a substitution was created.—TORRANCE, J.—*Ex parte Drummond*, 3 L. N., p. 114.

5 A universal residuary legacy to certain persons, in trust, to pay the annual revenue to M. C. during her natural life and at her death, to divide the capital between her children, created a substitution in favor of the children born and to be born, of M. C., and the property could not be seized to pay the debts of the substitution during the life time of the institute.—C. R.—*Chester vs Galt*, 26 L. C. J., p. 138, 4 L. N., p. 398.

6. That the bequest in a will of "the use, enjoyment, usufruct and interest" of the property of the testatrix, during the life time of the legatee, followed by the declaration that, after the death of the legatee, the testatrix gave and bequeathed to her legal heirs, then living, to be divided among them according to law, the freehold of the said property, did not create a substitution and that the legatee was a simple usufructuary, the right of property being in the heirs from the day of the death of the testatrix. That, as such usufructuary, the legatee was bound to give security, and, even if he were a *grévé de substitution*, he was also bound, under the circumstances disclosed in the case, to give security to the proprietors.—JETTÉ, J.—*Almour vs Ramsay*, 26 L. C. J., p. 228.

7. In this case, it was a fiduciary substitution that was created by the deed of donation and not a mere usufruct.—CIMON, J.—*Coutu vs Dorion*, M. L. R., 2 S. C., p. 132.

8. In this case, the will created a substitution and not a mere usufructuary right.—LORANGER, J.—*Phillips vs Bain*, M. L. R., 2 S. C., p. 300.

9. Que la disposition suivante d'un testament: "Je donne et lègue la jouissance à mes enfants pour par eux en jouir à titre de constitut et précaire leur vie durant. ..... et après le décès des dits légataires en usufruit, la propriété des dits biens fonds appartiendra à leurs enfants nés et à naître," contient une substitution.—C. R.—*Roy vs Gavin*, 14 R. L., p. 270.

10. A testator having bequeathed his estate as follows:—"I leave all my personal and real estate for the benefit of my wife and family, during her life, if she remain unmarried, to receive and apply such funds as may be accruing out of it for the support and maintenance of the family and educating them, and if she again marry, her dower is all that she will have out of the estate, the rest to be equally divided among the children," it was held that this created a substitution of which the widow was institute and the children substitutes, and was not a case of usufruct for the widow and *nue propriété* for the children, and that, although both the widow and the children had for years acted on the latter interpretation they were not thereby deprived of the right to urge the other interpretation now.—Q. B.—*McDonnell & Ross*, M. L. R., 2 Q. B., p. 249.

929. Substitutions may be created by gifts *inter vivos*, made in contracts of marriage or otherwise, by gifts in contemplation of death made in contracts of marriage, or by will.

The capacity of the persons is governed in each case by the nature of the act.

The disposition which creates the substitution may be conditional like any other gift or legacy.

Digitized by Google

Substitutions may be appended to dispositions that are either universal, or by general title, or by particular title.

The substitute need not be present at the gift *inter vivos* which creates the substitution in his favor ; he need not even have been born nor conceived at the time of the act.—Ricard, *Subst.* part. 1, nn. 110, 115 ; Pothier, *Subst.*, 486-7-8, 523-4-5-9 ; Guyot, *Subst.*, 482, 496, 497 ; Thév.-d'Ess., *Subst.*, nn. 4, 162-3-6 ; Thev. d'Ess. (Can. Ed.) 9, 29, 36, 38. [II. 381.]

DECISIONS :—1. A deed of donation stipulated that, after the death of the donor, his son should be usufructuary, and his son's children proprietors of certain real estate and that, in default of such issue, the property should belong to the other heirs of the donor who should enjoy and dispose of it in such manner as the donor should direct by his will. *Held:* 1. That this stipulation did not operate as a substitution and had the effect of creating a conditional reversion of the property in favor of the donor and his heirs. 2. That as the right reserved to the donor formed part of his property during his life, and of his succession at his death, and passed by his will to his son, the latter, having died childless, could under his father's will, by his own will dispose of the property as he saw fit.—Q. B.—*Dufaux & Herse*, 17 L. C. R., p. 246.

2. Que la résiliation, par le donateur et le donataire, de la donation créant une substitution en faveur des enfants à naître du donataire, n'affecte pas la substitution ni les droits des appelés. — C. R. — *Beaulieu vs Hayward*, 10 Q. L. R., p. 275.

930. Substitutions made by contract of marriage are irrevocable like gifts made in the same manner.

Substitutions made by other gifts *inter vivos* may be revoked by the donor, notwithstanding the acceptance by the institute for himself, [so long as they have not opened ; unless they have been accepted by the substitute, or in his behalf, either formally or in an equivalent manner, as in gifts in general.]

The acceptance made for themselves by institutes, even when they are strangers to the donor, also renders irrevocable the substitution in favor of their children born or to be born.

The revocation of a substitution, when it is allowed, cannot prejudice the institute nor his heirs by depriving them of the possible benefit of the lapse of the substitution, or otherwise. On the contrary, and although the substitute might have received but for the revocation, such revocation goes to the profit of the institute and not of the grantor, unless the latter has made a reservation to that effect in the act creating the substitution.

Substitutions by will may be revoked like all other testamentary dispositions.—Ricard, *Don.*, part. 1, n. 850 ; *Substit.*, part. nn. 137, 140 ; Thév.-d'Ess., nn. 1134-5-6-7-8 et notes p. 448 ; Ord. Don., art. 11, 12 ;

Digitized by Google

C. C. 772 ; *Contrà* as to irrevocability in all cases. — Ord. des Subst. tit. 1, article 11, 12 ; Pothier, *Subst.*, 489 ; Thev. d'Ess. (Can. Ed.) 53. [II. 381.]

931. Moveable property as well as immoveables may be the subject of substitutions. Unless corporeal moveables are subjected to a different disposition they must be publicly sold and their price be invested for the purposes of the substitution.

Ready money must also be invested in the same manner.

The investment must in all cases be made in the name of the substitution.—Thév. d'Ess., n. 69 ; *Contrà* as to the sale and use ; Ord. des Subst., tit. 1, art. 3 ; *Vide* Blanchet vs Blanchet, 11 L. C. R., p. 204 ; 2 Bourjon, 158 ; Pothier, *Subst.*, 529, 554 ; et 490-1 ; Thev. d'Ess. (Can. Ed.) 43. [II. 383.]

DECISIONS :—1. Que si des meubles substitués sont saisis sur le grevé par les créanciers de ce dernier, et qu'une opposition soit faite par le curateur à la substitution, réclamant distraction de ces meubles, la Cour ordonnera la vente des meubles et le dépôt du produit en Cour, pour que les deniers soient placés au nom de la substitution.—C. R.—*Compagnie de Prêt et de Dépôt du Canada vs Fraser*, 5 L. N., p. 219, 12 R. L., p. 421.

2. Qu'avant la promulgation du Code Civil la substitution de choses mobilières était prohibée.—MATHIEU, J.—*Joubert vs Walsh*, 12 R. L., p. 334, 28 L. C. J., p. 39, M. L. R., 1 S. C., p. 85.

3. Qu'en 1821, les biens meubles pouvaient, d'après la loi, de même que des biens immeubles, former l'objet d'une substitution dans les limites prévues par la loi.—BERTHELOT, J.—*Mitchell vs Moreau*, 13 R. L., p. 684.

4. Que le curateur à la substitution n'a pas le droit de recevoir les capitaux appartenant à cette substitution dont il doit être fait emploi conformément à l'article 931 C. C., ni de recevoir les intérêts des sommes appartenant à la substitution, vû que ces intérêts appartiennant aux grevés.—Q. B.—*Dorion & Dorion*, 13 R. L., p. 627, 4 Q. B. R., p. 213, M. L. R., 1 Q. B., p. 483.—Confirmed in Supreme Court, 13 S. C. R., p. 194.

932. [Substitutions created by will or by gifts *inter vivos* cannot extend to more than two degrees exclusive of the institute.]—Ric. *Sub.*, part. 2, n. 4 ; 2 Bourjon, 171 ; C. S. L. C., c. 34, s. 2 ; C. N., 1049 ; Thev. d'Ess. (Can. Ed.) 352. [II. 383.]

DECISION :—That by the old jurisprudence introduced into this Province and which was not affected in this particular by the Imperial Statute of 1774 (14 Geo. III, c. 83), but was still in force in August 1798, when the will in question was made, a substitution created by will was limited to two degrees of the institute. Degrees of substitution are counted by "heads" (*par têtes*) and not by "roots" (*par souches*). When the share of one among several, who took conjointly, passes to the others by his death, such transmission is reckoned an additional degree, as regards the share so transmitted.—Q. B.—*Jones & Cuthbert*, M. L. R., 2 Q. B., p. 44.—C. R.—M. L. R., 2 S. C., p. 23.

Digitized by Google

933. The rules concerning legacies in general also govern in matters of substitution, in so far as they are applicable, save in excepted cases.

Substitutions by gift *inter vivos*, like those created by will, are subject to the same rules as legacies, as to their opening, and after they have opened. Whatever relates to the form of the act, and the acceptance and prehension of the property by the first donee, remains subject to the rules which belong to gifts *inter vivos*.

An acceptance by the first institute under the gift is sufficient for the substitutes, if they avail themselves of the disposition, and if it have not been validly revoked.

If the gift *inter vivos* lapse in consequence of repudiation or for want of acceptance on the part of the first donee, fiduciary substitution does not take place, nor does the vulgar unless the donor has so provided.—Thév.-d'Ess., nn. 69, 76, 142-3-4, 159, 161-2-3, 170-1-2, 528-9, 612 ; Ricard, *Subst.*, c. 10, n. 130 ; 2 Bourjon, 155-8 ; Guyot, *Subst.*, 482 ; Pothier, *Subst.*, 488, 490, 514 ; 3 L. C. Jurist, 141, Joseph vs Castonguay ; Thev. d'Ess. (Can. Ed.) 27, 168. [II. 383.]

DECISIONS :—1. Lorsqu'un usufruit est constitué par acte de donation en faveur de plusieurs personnes conjointement et qu'il y a substitution de la propriété, les appelés ne peuvent recueillir qu'après la mort de tous les usufruitiers ; y ayant lieu ou droit d'*accroissement* en faveur des survivants jusqu'au dernier.—Q. B.—*Joseph & Castonguay*, 1 R. L., p. 200.

2. Dans le cas d'une donation par une mère à un de ses fils, à la condition que si le donataire meurt avant ses frères et sœurs, les biens donnés retourneront *à leurs enfants légitimes par souches*, les enfants d'un frère du donataire décédé avant la donation auront droit à une part, comme ceux des frères et sœurs décédés après la donation.—Privy Council.—*Leclère & Beaudry*, 5 R. L., p. 626, 17 L. C. J., p. 178, 5 P. C. App., p. 362.

3. Que la résiliation, par le donateur et le donataire, de la donation créant une substitution en faveur des enfants à naître du donataire, n'affecte pas la substitution ni les droits des appelés.—C. R.—*Beaulieu vs Hayward*, 10 Q. L. R., p. 275.

934. The testator may impose a substitution either upon the donee or the legatee whom he benefits, or upon his heir on account of what he leaves him as such.—Pothier, *Subst.*, 525 ; Guyot, *Subst.*, 477 ; Thev. d'Ess. (Can. Ed.) 31. [II. 383.]

935. The donor in an act *inter vivos* cannot subsequently create a substitution of the property he has given, even in favor of the children of the donee.

Nor can he reserve the right of doing so, except it be in a contract of marriage. The grantor may however reserve to himself, in all cases,

Digitized by Google

the right to determine the proportions in which the substitutes shall receive.

Nevertheless the donor or testator may, in a new gift *inter vivos* of other property to the same person, or in a will, create a substitution of the property given unconditionally in the first gift ; such a substitution takes effect only by virtue of the acceptance of the subsequent disposition of which it forms a condition, and does not prejudice the rights acquired by third parties.—Ord. des Subst., tit., 1, art. 13, 15 ; Thév.-d'Ess., nn. 123, 127; C. C. 824 ; Pothier, *Subst.*, 527 ; Thév.-d'Ess. (Can. Ed.) 49. [II. 383 to 385.]

936. Children who are not called to the substitution, but are merely named in the condition without being charged to deliver over to others, are not deemed to be included in the disposition.—Ricard, *Subst.*, part. 1, n. 501 ; 2 Bourjon, 167 ; Pothier, *Subst.*, 504-5-6-7 ; Ord. des Subst., tit., 1, art. 19 ; Thév.-d'Ess., *Subst.*, nn. 939 et seq. ; Thév.-d'Ess. (Can. Ed.) 96, 613. [II. 385.]

937. In substitutions, as in other legacies, representation does not take place, unless the testator has ordained that the property shall pass in the order of legitimate successions, or his intention to that effect is otherwise manifest.—Ord. des Subst., tit. 1, art. 21 ; Thév.-d'Ess., n. 64 ; Ricard, *Subst.*, part. 1, nn. 663 et seq. ; Thév.-d'Ess. (Can. Ed. 96, 155. [II. 385.]

DECISIONS:—1. Dans l'espèce, une substitution fidéicommissaire étant faite en terme collectif, les biens substitués doivent se partager entre les appelés par souches et non par têtes, ou la transmission des biens laissés à deux enfants à charge de substitution graduelle en faveur de leurs descendants, se fait par souches.—Dans l'espèce, la substitution s'ouvrant en faveur d'un des appelés, avant de s'ouvrir pour les autres, cet appelé peut immédiatement demander sa part sans attendre l'ouverture de la substitution en faveur de ses co-appelés.—MONK, J.—*Dumont vs Dumont*, 7 L. C. J., p. 12.

2. Dans les substitutions, il n'y a pas lieu au droit de *représentation*, à moins que le donateur n'ait manifesté clairement son intention de déférer les biens suivant l'ordre des successions légitimes.—La mort d'un des appelés, savoir, un des petits-enfants de la donatrice, avant l'ouverture de la substitution, n'a pas produit un droit de *représentation* en faveur des demanderesses, arrière-petits-enfants de la donatrice et enfants de l'*appelé* décédé avant l'ouverture de la substitution, mais a produit un droit d'*accroissement* en faveur des *appelés* vivant lors de l'ouverture de la substitution.—C. R.—*Castonguay vs Beaudry*, 1 R. L., p. 93.

3. La représentation en ligne directe a lieu en matière de substitution.—LORANGER, J.—*Brunette vs Péloquin*, 3 R. L., p. 52.

4. The expression " *enfans* " in a donation creating a substitution in their favor, includes " *les petits enfants* ", in the absence of any express limitation in

Digitized by Google

the deed in favor of the children only.—C. R.—*Joubert vs Walsh*, M. L. R., 1 S. C., p. 85, 28 L. C. J., p. 39, 7 L. N., p. 134.—MATHIEU, J.—12 R. L., p. 334.

5. Que la désignation des appelés par les mots "*enfants nés de mon mariage*" dans un testament créant une substitution, est la manifestation de l'intention du testateur que représentation ait lieu, et qu'il faut des termes clairs et précis pour ôter au mot "*enfants*" cette signification que lui donne expressément la loi (C. C. 980.)—C. R.—*Marcotte vs Noel*, 6 Q. L. R., p. 245.

SECTION II.—OF THE REGISTRATION OF SUBSTITUTIONS.

938. Besides the effect of registration or of the omission to register, as regards gifts and wills respectively as such, any of these acts containing fiduciary substitutions, either in respect of moveable or of immoveable property, must be registered in the interest of the substitutes and of third parties.

Substitutions in the direct line in contracts of marriage, and those in respect of corporal moveables accompanied with actual delivery to the first donee are not exempt from registration.

The failure to register substitutions operates in favor of third parties, to the prejudice of the substitutes, though the latter be minors, or interdicted, or not yet born, and even against married women, and they cannot be relieved from it; saving their recourse against those whose duty it was to procure the registration.—C. S. L. C., c. 37, s. 29; Ord. de Moulins, art. 57; Ricard, *Substit.*, part. 2, n. 120; 2 Bourjon, 178, 179, 180; Pothier, *Subst.*, 491 et seq.; C. N., 1069; Thév.-d'Ess. (Can. Ed.) 217. [II. 335.]

DECISIONS:—1. Registration of substitution only became law in 1855, (18 Vict., cap. 101,) and previous registration will not avail.—Q. B.—*McIntosh vs Bell*, 12 L. C. J., p. 121.

2. Que l'enrégistrement d'une substitution doit être renouvelé dans les deux ans de la mise en force de 2:68 C. C. Que l'enrégistrement d'un testament contenant une substitution faite en 1853, n'a pas l'effet de remplacer l'insinuation qui était alors obligatoire.—MATHIEU, J.—*Poitras vs Lalonde*, 11 R. L., p. 356.

939. The want of registration may be invoked against the substitution by all parties interested who are not within some particular exception.—2 Ricard, *Subst.*, part. 2, n. 120; Pothier, *Subst.*, pp. 495-6; C. N., 941, 1070; Thév.-d'Ess. (Can. Ed.) 220. [II. 385.]

940. Neither the grantor, nor the institute, nor their heirs or universal legatees, can avail themselves of the want of registration, but it may be invoked by those who have acquired from them in good faith by a particular title, whether onerous or gratuitous, and by

Digitized by Google

their creditors.—Pothier, *Subst.*, 445-6; Ord. des Subst., tit. 2, art. 34; C. N., 941, 1070, 1072; Thév.-d'Ess. (Can. Ed.) 221. [II. 355.]

DECISIONS :—See cases noted at C. C., 941, 942 & 1484.

941. The registration of acts containing substitutions takes the place of their inscription in the offices of the courts, and of their judicial publication, which formalities are abolished.

Such registration must be effected within six months from the date of the gift *inter vivos*, or from the death of the testator. The effect of the registration of gifts *inter vivos* within such delay, as regards third parties whose claims are registered, is explained in the title *Of Registration of real rights.* As regards all other parties, and in cases of substitution by will, registration within the same delays has a retroactive effect to the time of the gift, or to that of the death. If it take place subsequently, its effect commences only from its date.

Nevertheless the special delays established, as regards wills, for the cases where the testator dies beyond Canada, or where the deed has been concealed, apply with equal retroactive effect to the substitution contained in the will in such cases.

Substitutions affecting immoveables must be registered in the registry office of the division in which they are situated, and also, when they are created by gifts made in contemplation of death, or by will, at the registry office of the domicile of the grantor.

If it affect moveable property, it must be registered in the registry office of the division in which the donor at the time of the donation, or the testator at the time of his death, had his domicile.—C. S. L. C., c. 37, ss. 28-29; Pothier, *Subst.*, 494-5; Ord. des Subst., tit. 2, art. 27, 28, 29; C. C., 804; C. N., 1049; Thév.-d'Ess. (Can. Ed.) 216. [II. 387, III. 379.]

DECISIONS :—1. Even before the registry laws in Lower Canada, the want of *publication et insinuation* of a will creating a substitution within six months of the death of the testator, did not invalidate the substitution.—Q. B.—*Bulmer & Dufresne*, 3 Q. B. R., p. 40.—SUPREME COURT.—C. D., p. 533.

2. Que l'enrégistrement d'un testament contenant une substitution, faite en 1853, n'a pas l'effet de remplacer l'insinuation qui était alors nécessaire.—MATHIEU, J.—*Poitras vs Lalonde*, 11 R. L., p. 356.

3. Qu'une substitution contenue dans un testament du 22 novembre 1848, qui n'a jamais été lu et publié, ainsi qu'exigé par la loi, à l'époque où le testateur est décédé, est sans effet à l'encontre d'un tiers détenteur par titre provenant du légataire grévé de substitution.—Q. B.—*Boulé & Langis*, 10 R. L., p. 135.

942. The following persons are bound to register substitutions, when they are aware of their existence, namely:

Digitized by Google

1. The institute who accepts the gift of legacy;

2. The substitute of age, who is himself charged to deliver over;

3. Tutors or curators of the institute or of the substitutes, and the curator to the substitution;

4. The husband for his wife who is so bound.

Those who are bound to effect the registration of the substitution, and their heirs and universal legatees, or legatees by general title, cannot avail themselves of the want of such registration.

The institute who has neglected to register is moreover subject to lose the fruits, as in the case of neglect to have an inventory made. —Ricard, *Subst.*, part. 2, n. 130; 2 Bourjon, 178; Ord. des Subst., tit. 2, art. 23, 30; Pothier, *Subst.*, 494, 496, 553; C. N. 941, 1069, 1070, 1072, 1073; Thév.-d'Ess. (Can. Ed.) 218. [II. 387.]

DECISION:—L'intimée, appelée à la substitution créée par le testament de son père, réclame par action pétitoire, de l'appelant, un immeuble faisant partie des biens de la dite substitution. L'appelant, dans sa défense, allègue, qu'il a acquis cet immeuble à une vente judiciaire, à la poursuite d'un créancier préférable à la substitution, laquelle se trouve, en conséquence, purgée par le décret. Réponse de l'intimée que cette créance n'était préférable à la substitution, que par l'enrégistrement tardif du testament créant la dite substitution et que l'appelant, ayant été son tuteur, ne pouvait se prévaloir de ce défaut. Aucune allégation de la connaissance du testament par l'appelant n'est faite dans la dite réponse. *Jugé.*—Que l'appelant ayant invoqué, à l'encontre de l'action pétitoire, un titre bon et valable à sa face, l'intimée était tenue d'en démontrer la nullité et, qu'en l'absence d'allégations et de preuve que l'appelant, tuteur de l'intimée, connaissait l'existence de ce testament, il est bien fondé à en invoquer l'enrégistrement tardif. (C. C. 1484.)—Q. B.—*Terrien & Labonté*, 2 Q. B. R., p. 90.

943. The acts and declarations of investment of the moneys belonging to the substitution must also be registered within six months from their date.—Authorities under the preceding article; Thév.-d'Ess., (Can. Ed.) 943. [II. 387.]

SECTION III.—OF SUBSTITUTIONS BEFORE THEIR OPENING.

944. The institute holds the property as proprietor, subject to the obligation of delivering over, and without prejudice to the rights of the substitute.—Ricard, *Subst.*, part. 1, n. 100; 2 Bourjon, 186; Pothier, *Subst.*, 541, 543, 559; Guyot, *Subst.*, 522-3; Thév. d'Ess., nn. 11, 631-2-3.; Thév.-d'Ess., (Can. Ed.) 176-203. [II. 387.]

DECISION:—1. La défense d'aliéner et l'insaisissabilité portées à un acte de donation, ne peuvent être invoquées dans le cas de réparations nécessaires faites pour augmenter la valeur et le revenu de la chose donnée; le bail pour neuf années ne comporte pas une aliénation; le vice d'anticipation ne peut être

Digitized by Google

invoqué que par le nu propriétaire, l'appelé à la substitution, la pupille ou la femme, excepté dans le cas de fraude.—BEAUDRY, J.—*Valois vs Garneau*, 2 R. L, p. 131.

See also cases noted at C. C. 948.

★ **945.** If all the substitutes be not born, the institute is bound to obtain, in the manner established as regards tutors, the judicial appointment of a curator to the substitution, to represent the substitutes yet unborn, and to attend to their interests in all inventories and partitions and other circumstances in which his intervention is requisite or proper.

The institute who neglects to fulfil this obligation may be declared to have forfeited in favor of the substitute the benefit of the disposition.

All persons who are competent to demand the appointment of a tutor to a minor of the same family may also demand the nomination of a curator to the substitution.

Substitutes who are born but incapable are represented as in ordinary cases.—2 Bourjon, 160; Guyot, *Tuteur à Subst.*, 339; 2 Pigeau, 313; Thév.-d'Ess., *Subst.*, c. 88; C, N., 1055, 1056, 1057; Thév.-d'Ess., (Can. Ed.) 400. [II. 387.]

Amendment: Article 945 of the Civil Code is amended to read in the following manner.

" 945. All substitutes, born and unborn, are represented in all inventories and partitions by a curator to the substitution, appointed in the manner established as regards tutors. The curator to the substitution attends to the interest of such substitutes in all such inventories and partitions, and represents them in all cases in which his intervention is requisite or proper.

The institute who neglects to demand this nomination may be declared to have forfeited in favor of the substitute the benefit of the disposition.

All persons who are competent to demand the appointment of a tutor to a minor of the same family, may also demand the nomination of a curator to the substitution."—Q. 38 Vict., cap. 13.

DECISIONS:—1. An action does not lie in favor of a tutor elected *en justice* to a substitution under a will, to have the enjoyment of the usufructuary declared forfeited, *en déchéance d'usufruit*.—C. R.—*Gauthier vs Boudreau*, 3 L. C. J., p. 54.

2. The tutor to a substitution, impleaded in that capacity, represents all the *appelés* to the substitution, in a case where such *appelés* are not mentioned by name in the instrument creating the substitution.—Q. B.—*Castonguay & Castonguay*, 14 L. C. R., p. 308.

Digitized by Google

3. La substitution n'étant pas ouverte, le curateur à la substitution n'a aucun droit ni intérêt à formuler une opposition afin d'annuler la saisie d'un immeuble substitué.—C. R.—*Wilson vs Leblanc*, 13 L. C. J., p. 201.

4. Qu'un curateur à une substitution n'a pas le droit d'exiger, en sa qualité, le paiement des capitaux ou intérêts des capitaux substitués.—MATHIEU, J.—*Moreau vs Dorion*, 12 R. L., p. 380.

5. A curator to a substitution has no right of action to recover from a curator, in whose stead he is appointed, any moneys due by the latter to institutes. —SUPREME COURT.—*Dorion & Dorion*, 13 S. C. R., p. 194.—Q. B.—13 R. L., p. 627, 4 Q. B. R., p. 213, M. L. R., 1 Q. B., p. 483.

6. Que le fils d'un grevé de substitution et exécuteur testamentaire du substituant, ne peut être nommé curateur à telle substitution.—C. R.—*Mercier vs Labadie*, 14 R. L., p. 463.

7. The persons in whose favor a property is substituted are entitled to intervene for the protection of their interests in an action directed against a trustee administering the property under a marriage contract, to have him removed from the position of trustee and to compel him to render an account.—Q. B.—*Larue & Rattray*, 9 L. N., p 356, 12 Q. L. R., p. 258, 14 R. L., p. 615.

946. The institute is bound, within three months to have an inventory made at his own expense of the property comprised in the substitution, as well as a valuation of the moveable effects, if they have not already been included as such and valued likewise in a general inventory of the property of the succession, made by other persons. All persons interested must either be present or have been notified to that effect.

In default of the institute, the substitutes, their tutors or curators, and the curator to the substitution have the right, and are bound, except the substitutes when they are not obliged to deliver over, to cause such inventory to be made at the expense of the institute, after notifying him, and all others interested, to be present.

So long as the institute fails to have such inventory and valuation made he is deprived of the fruits.—2 Bourjon, 160 ; Pothier, *Subst.*, 522-3 ; 2 Pigeau, 313 ; Guyot, *Tuteur à Subst.*, 339 ; Ord. des Subst., tit. 2, art. 1, 2, 4, 5 ; C. N., 1058, 1059, 1060 ; Thév.-d'Ess., (Can. Ed.) 226. [II. 387 to 389.]

DECISION :—Que des appelés de substitution ayant éventuellement droit à la propriété possédée par des grevés, ont droit de faire un inventaire des biens substitués, aux frais des grevés et d'y appeler ces derniers, dans le cas où ils refusent de le faire eux-mêmes, mais ils ne peuvent prendre une action pour forcer les grevés à procéder à cet inventaire.—TASCHEREAU, J.—*Bourassa vs Ste. Marie*, M. L. R, 4 S. C., p. 41.

947. The institute performs all the acts that are necessary for the preservation of the property.

Digitized by Google

He is liable on his own account for all rights, rents, charges and arrears falling due within his time.

He makes all payments, receives moneys due and reimbursements, invests capital sums and exercises before the courts all the powers necessary for these purposes.

For the same purposes he makes the necessary advances for law expenses and other necessary disbursements of an extraordinary nature, the amount of which is refunded to him or his heirs, either in whole or in part, according to what appears to be equitable at the time when he delivers over.

If he have redeemed rents or paid the principal of debts due, without having been charged to do so, he and his heirs have a right to be paid back, at the same time, the moneys so disbursed, without interest.

If such redemption or payment have been made in anticipation without sufficient reason, and would not have been demandable at the time of the opening, the substitute need not, until the time when they would have become exigible, do more than pay the rents or interests. —2 Bourjon, 160-3; Pothier, *Subst.*, 54I-2; Guyot, *Subst.*, 522 et seq.; Thév., d'Ess., (Can. Ed.) 206. [II. 389].

Amendments:—See amendments noted at C. C., 294.

DECISIONS:—1. A witness summoned to give evidence in a cause wherein the defendant was a party, in his quality of tutor to a substitution, cannot recover the amount of his taxation in an action bought against the tutor personally.—SMITH, J.—*Dagenais vs Gauthier*, 11 L. C. R., p. 281.

2. Que le grevé de substitution peut être autorisé à toucher, sur les capitaux de la substitution, le montant nécessaire pour faire les grosses réparations, s'il n'est pas lui-même en état de faire ces réparations.—MATHIEU, J.—*In re Desrivières*, 12 R. L., p. 649.

948. The rules concerning indivision set forth in the title *Of Successions*, apply equally to substitutions, save the provisional nature of the partition while they last.

In the case of forced sale of immoveables or any other lawful alienation of the property comprised in a substitution, and in the case of redemption of rents or capital sums, the institute, or the testamentary executors authorized to administer in his place, are bound to invest the price, in the interest of the substitutes, with the consent of all parties interested; or upon the refusal of such parties, the investment is made under judicial authorization, obtained after due notice to them being given.—2 Bourjon, 160; Pothier, *Subst.*, 542, 543, 552; Guyot, *Subst.*, 527; Thev. d'Ess. (Can. Ed.) 228. [II. 389.]

Digitized by Google

DECISION:—Land purchased by the *grevé de substitution*, with moneys arising out of the redemption of a constituted rent which belongs to the substitution, takes the place in all respects of the constituted rent, so much so, that the *appelés* to the substitution have a right to the land or its value, and not merely to the value of the constituted rent.—Q. B.—*Guy & Guy*, 22 L. C. J., p. 213.

949. The obligation of delivering over the property of the substitution in an undiminished state, and the nullity of all his acts in contravention thereof, do not prevent the institute from hypothecating or alienating such property, without prejudice to the rights of the substitute, who takes it free from all hypothecs, charges or servitudes and even from the continuation of lease, unless his right has been prescribed according to the rules contained in the title *Of Prescription*, or unless a third party has a right to avail himself of the want of registration of the substitution.—Authorities under C. C., 951; Thev. d'Ess. (Can. Ed.) 215, 263. [II. 389.]

DECISIONS:—1. La vente d'un immeuble substitué ne peut pas être opposée tant que la substitution n'est pas ouverte.—BERTHELOT, J.—*Cie. de Prêt vs Vadeboncœur*, 4 L. C. J., p. 358.

2. La prohibition d'engager ou d'hypothéquer des biens substitués, légués comme aliments, n'empêche pas le grevé de les engager ou hypothéquer dans le but de les protéger contre une aggression tendant à en dépouiller le grevé, et la validité de l'hypothèque consentie par le grevé, pour cet objet, n'est pas affectée par l'insuccès des mesures adoptées pour empêcher la vente qui menace d'en dépouiller le grevé. En d'autres termes:—*Jugé:* Que l'avocat qui représente le propriétaire d'un bien déclaré alimentaire, inaliénable et insaisissable, pour tenter de le conserver au légataire, acquiert contre ce dernier une créance alimentaire pour la répétition de ses déboursés et honoraires. (Art. 558, C. P. C.)—Les admissions du propriétaire de biens déclarés alimentaires, si elles ne sont pas entachées de collusion, font preuve contre lui du caractère alimentaire de la créance, au paiement de laquelle on oppose la prohibition d'hypothéquer ou aliéner contenue dans un testament.—La dette hypothécaire due par le curateur à la substitution et née de la défense des biens de la substitution, n'est pas contestable par le grevé sur le motif que les biens lui ont été légués en usufruit et ont été déclarés inaliénables et insaisissables, pour lui assurer des aliments.—C. R.—*Doutre vs Leblanc*, 16 L. C. J., p. 197.

3. Un grevé de substitution auquel des biens (déclarés inaliénables et insaisissables) ont été légués en usufruit à titre d'aliments, peut valablement hypothéquer ces mêmes biens, envers des personnes qui deviennent des cautions judiciaires, à sa demande, pour poursuivre l'appel d'un jugement dont l'exécution entraînerait la vente des dits biens, et par conséquent la perte de l'usufruit et des aliments; et la validité de cette hypothèque n'est pas affectée par l'insuccès de l'appel.—C. R.—*Wilson & Leblanc*, 16 L. C. J., p. 207.

4. Le pouvoir accordé au grevé de vendre les immeubles substitués peut être cédé.—Le pouvoir accordé au grevé de vendre les immeubles substitués, *si par experts et gens à ce connaissants, c'est jugé avantageux*, n'oblige pas le grevé à recourir au tribunal pour la nomination des experts et pour obtenir un jugement

Digitized by Google

lui permettant de vendre, mais il est seulement tenu de faire nommer un curateur à la substitution pour la nomination d'un expert.—PRIVY COUNCIL.—*Leclère & Beaudry*, 5 R. L., p. 626, 17 L. C. J., p. 178, 5 P. C. App., p. 362.

5. Les grevés de substitution sont propriétaires. Ils ne peuvent lier les appelés, mais ils peuvent aliéner, et leurs actes d'aliénation sont valables tant que la substitution dont ils sont grevés n'est pas ouverte.—TASCHEREAU, J.—*Poüliot vs Fraser*, 3 Q. L. R., p. 349.

6. Where the *grevé de substitution* sold the right to take away sand from the property charged during his life time for a period of five years, it was held that the substitutes had a direct action against the purchaser to recover the value of the sand.—Q. B.—*Bulmer & Dufresne*, 3 Q. B. R., p. 90.—SUPREME COURT.—C. D. p. 533.

950. Forced sales under execution, or by licitation, are likewise dissolved in favor of the substitute by the opening of the substitution, if it have been registered, unless the sale comes within one of the cases mentioned in article 953.—Authorities under article 951 ; Thev. d'Ess. (Can. Ed.) 269. [II. 389.]

DECISIONS :—See case noted at C. C. 942 and 1984.—Q. B.—*Terrien & Labonté*, 2 Q. B. R., p. 90.

951. The institute cannot compound as to the ownership of the property in such a manner as to bind the substitute, except in cases of necessity, when the interest of the latter are concerned, and after being judicially authorized in the manner required for the sale of property belonging to minors.—Ricard, *Subst.*, part. 2, n. 90 ; Pothier, *Subst.*, 543 ; Guyot, *Transaction*, 236 ; Ord. des Subst., tit. 2, art. 53 ; Thév.-d'Ess., *Subst.*, 788, 857 et seq ; Thev. d'Ess. (Can. Ed.) 214. [II. 389.]

DECISION :—Que l'ordinance des substitutions donnée par Louis XV, Roi de France, en 1747, n'a jamais été en force dans le Bas-Canada, et que tout grevé de substitution sous les dispositions du droit français avant la dite ordonnance et qui était en force dans la province avant la publication du Code Civil, pouvait et devait, avec l'autorisation judiciaire obtenue par lui et par le tuteur à la substitution, suivant les formalités en usage, aliéner les immeubles sujets à la substitution pour cause nécessaire et lorsqu'il y avait urgence d'acquitter les dettes primant les substitués et d'en prévenir la vente par décret, et que telles aliénations étaient finales et ne pouvaient être résolues à l'ouverture de la substitution.—Q. B.—*Caty & Perrault*, 16 R. L., p. 148.—TASCHEREAU, J.—M. L. R., 1 S. C., p. 131.

952. The grantor may indefinitely allow the alienation of the property of the substitution, which takes place, in such case, only when the alienation is not made.—Ricard, *Subst.*, part. 2, n. 76 ; Pothier, *Subst.*, 537 ; Guyot, *Subst.*, 507 ; Thév.-d'Ess., *Subst.*, n. 787 ; Thev. d'Ess. (Can. Ed.) 237. [II. 391.]

Digitized by Google

DECISIONS:—1. The clause in the donation permitting the alienation of the *fonds à constitution de rente*, in case it were found by experts to be advantageous to the children of the donee, will be carried into effect by the court on such report of experts, in an action by the donee praying to be authorized to sell, although the donee had no children, and was not likely to have any.—Q. B.—*Castonguay & Castonguay*, 14 L. C. R., p. 308.

2. The authority contained in the deed of donation recited in the pleadings, to sell the property therein described, if experts should deem it advantageous to do so, could be legally acted on, on experts so reporting, without the necessity of any subsequent judicial proceedings.—PRIVY COUNCIL.—*Leclère & Beaudry*, 17 L. C. J., 178, 5 R. L., p. 626, 5 P. C. App., p. 362.

953. The final alienation of the property of a substitution may moreover be validly effected while the substitution lasts:

1. By expropriation for public purposes or in virtue of some special law;

2. By forced judicial sale on account of a debt due by the grantor, or of hypothecary claims anterior to his possession. The obligation of the institute to discharge the debt or hypothec does not prevent the sale from being valid in this case against the substitution, but the institute is liable towards the substitute for all damages;

3 With the consent of all the substitutes, when they are in the exercise of their rights. If some of them only have consented, the alienation hold good as regards them, without prejudicing the others;

4. When the substitute as heir or legatee of the institute is answerable to the purchaser for the eviction;

5. As regards moveable things sold in conformity with section I of this chapter.—Ricard, *Subst.*, c. 6, n. 258, c. 13, nn, 99 et seq; 2 Bourjon, 160, 179, 189 et seq; Pothier, *Subst.*, 531, 533, 534, 548; Guyot, *Subst.*, 527 et seq.; Héricourt, *Vente des immeubles*, 49; Thev. d'Ess. (Can. Ed.) 242. [II. 391.]

Amendments: See the amendments effected by the different Railway Acts noted at C. C. 297.

DECISIONS:—1. The sale made of a substituted property for debts created by the author of the substitution, or for other debts or charges anterior to the substitution, is a valid sale, and purges the substitution.—The institute can legally become purchaser of the property *délaissé* by him for the debts of his *auteur*.—Q. B.—*McIntosh & Bell*, 12 L. C. J., p. 121.

2. An authorisation to the curator to a substitution to sell real property affected by the substitution, unaccompanied by a similar authorisation to a tutor *ad hoc* to such of the substitutes as are living, but incapable of acting, is insufficient.—BERTHELOT, J.—*Benoit vs Benoit*, 18 L. C. J., p. 286.

954. [The wife of the institute has no subsidiary recourse

Digitized by Google

against the property of substitutions for the securing of her dower or her dowry.] — C. N. 1054 ; Thév.-d'Ess., (Can-Ed.) 258. [II. 391.]

955. If the institute deteriorate, waste or dissipate the property, he may be compelled to give security or to allow the substitute to be put in possession of it as a sequestrator.—Ricard, *Subst.*, c. 10, nn. 25, 26 ; 2 Bourjon, 160 ; Pothier, *Subst.*, 552 ; Guyot, *Subst.*, 536 ; Thév.-d'Ess., *Subst.*, nn 780, 781, 782 ; Thév.-d'Ess. (Can. Ed.) 235. [II. 391.]

DECISIONS :—1. An action does not lie in favor of a tutor, elected *en justice* to a substitution under a will, to have the enjoyment of the usufructuary declared forfeited, *en déchéance d'usufruit*.—C. R. *Gauthier vs Boudreau*, 3 L. C. J., p. 54.

2. The fact that the substitutes did not avail themselves of the right to have a sequestrator appointed, when the *grevé de substitution* sold, during his life time, the right for five years to take sand from the property charged, did not prevent them and was not such a *lâche* as to deprive them of their right to recover, by direct action, from the purchaser of the sand, the value thereof, or rather, the amount whereby the property was deteriorated.—Q. B.—*Bulmer & Dufresne*, 3 Q. B. R., p. 90,—Supreme Court,—C. D., p. 533.

956. The substitute may, while the substitution lasts, dispose by act *inter vivos* or by will, of his eventual right to the property of the substitution, subject to the contingency of its lapsing, and to its ulterior effects if it continue beyond him.

The substitute or his representatives may, before the opening, perform all acts of a conservatory nature connected with his eventual right, whether against the institute or against third persons.—Ricard, *Subst.*, c. 13, n. 89 ; Pothier, *Subst.*, 551-2 ; Thév.-d'Ess., *Subst.*, n. 757, *contrà, ainsi que les anciens auteurs qui ne connaissent aucun droit avant l'ouverture et même avant l'acceptation ou la délivrance* ; Thév.-d'Ess. (Can. Ed.), 232. [II. 391.]

DECISIONS :—1. Qu'on ne peut saisir et vendre des biens substitués, avant l'ouverture de la substitution, pour le recouvrement d'une créance des appelés.—JETTÉ, J.—*Chester vs Galt*, 12 R. L., p. 54.

2. Que les appelés à une substitution ont un intérêt suffisant pour les autoriser à intervenir dans une poursuite affectant cette substitution.—Q. B.—*Larue & Rattray*, 14 R. L., p. 614.

957. The substitute who dies before the opening of the substitution in his favor, or whose right to it has otherwise lapsed, does not transmit such right to his heirs, any more than in the case of any other unaccrued legacy.—2 Bourjon, 173 ; Pothier *Subst.*. 550 ; Thév.-d'Ess., *Subst.*, nn. 510 et seq.; 556 et seq.; Thév.-d'Ess. (Can. Ed.) 157, 161. [II. 391.]

DECISIONS :—Que dans le cas d'une donation par une mère à ses fils, à la condition que si le donataire meurt avant ses frères et sœurs, les biens

Digitized by Google

donnés retourneront *à leurs enfants légitimes par souches*, les enfants d'un frère du donataire décédé avant la donation, auront droit à une part, comme ceux des frères et sœurs décédés après la donation.—PRIVY COUNCIL.—*Leclère vs Beaudry*, 5 R. L., p. 626, 17 L. C. J., p. 178, 5 P. C. App., p. 362.

958. As regards the repairs which the institute is bound to make, and the reimbursements he or his heirs may claim for the improvements he has made, the same rules apply as are laid down for the emphyteutic lessee in articles 581 and 582.—Pothier, *Subst.*, p. 534 ; Thév.-d'Ess. (Can. Ed.) 207. [II. 391 to 393.]

959. Judgments obtained by third parties against the institute cannot be impugned by the substitutes, on the ground of the substitution, if, in the same suits, they, or their tutors or curators, or the curator to the substitution, besides the executors and administrators of the will, if there were any in function, were impleaded.

If the substitutes, or those who may be thus impleaded in their place, have not been included in the suit, such judgments may be impugned, whether the institute has or has not contested the action brought against him.—Décl. du 22 mars 1732; Edits et Ord. 533; Guyot, *Subst.* 545 ; Thév.-d'Ess., *Subst.*, n. 1258; 2 Pigeau, 407 ; Thév.-d'Ess., (Can. Ed.) 398. [II. 393.]

960. The institute may, but without prejudice to his creditors, deliver over the property in anticipation of the appointed term, unless the delay is for the benefit of the substitute.— Doubtful question under the old law ; Ord. des Subst., tit. 1, art. 42; Thév.-d'Ess., *Subst.*, nn. 1044 et seq.; *Contrà*, Ricard, *Subst.*, part. 2, nn. 27, 40, 48 ; 2 Bourjon, 171 ; Pothier, *Subst.*, 556-7 ; Guyot, *Subst.*, 537 ; Thév.-d'Ess. (Can. Ed.) 329. [II. 393.]

SECTION IV.—OF THE OPENING OF SUBSTITUTIONS AND THE DELIVERING OVER OF THE PROPERTY.

961. When no period is assigned for the opening of a substitution and the delivering over of the property, they take place at the death of the institute.—Ricard, *Subst.*, part. 2, n. 27 ; 2 Bourjon, 171 ; Pothier, *Subst.*, 555 ; C. N. 1053 ; Thév.-d'Ess., (Can. Ed.), 111-150. [II. 393.]

DECISIONS:—1. En vertu des clauses d'un testament portant substitution et qui sont en substance comme suit: "pour par un tel en jouir en usufruit, sa "vie durant seulement, la propriété sera et appartiendra à l'enfant mâle aîné issu

Digitized by Google

"en légitime mariage de B. H., et au cas que B. H. décéderait sans enfant mâle né "ou à naître en légitime mariage, le testateur veut et ordonne qne la propriété "soit transmise à l'enfant mâle né en légitime mariage de E. H., etc., etc."; il suffit que celui des enfants de B. H. qui doit recueillir soit un enfant mâle vivant à son décès, et c'est alors que la substitution doit s'ouvrir au profit de cet enfant; que cet enfant ait eu un frère aîné prédécédé ou n'en ait pas eu.—Q. B.—*McCarthy & Hart*, 3 L. C. J., p. 29.

2. Que lors de l'ouverture d'une substitution, ceux qui sont tenus de faire l'inventaire et qui par suite ont le choix du notaire, sont les héritiers du grevé de substitution décédé, et non pas les appelés à la substitution, qui peuvent, néanmoins, requérir l'assistance d'un second notaire.—MATHIEU, J.—*Labelle vs Labelle*, M. L. R., 2 S. C., p. 166.

962. The substitute takes the property directly from the grantor and not from the institute.

The substitute, by the opening of the substitution in his favor, becomes immediately seized of the property in the same manner as any other legatee; he may dispose of it absolutely and transmit it in his succession, if he be not prohibited from doing so, or if the substitution do not continue beyond him. — 2 Bourjon, 172 ; Guyot, *Subst.*, 558 ; Pothier, *Subst.*, 559. ; Thév.-d'Ess., (Can. Ed.), 128-147. [II. 393.]

DECISIONS :—1. Dans l'espèce, une substitution fidéicommissaire étant faite en terme collectif, les biens substitués doivent se partager entre les appelés par souches et non par têtes, ou la transmission des biens laissés à deux enfants à charge de substitution graduelle en faveur de leurs descendants, se fait par souches.—MONK, J.—*Dumont vs Dumont*, 7 L. C. J., p. 12.

2. Que l'appelé à une substitution, qui doit s'ouvrir en sa faveur au décès du grevé, a droit aux fruits et revenus des immeubles substitués depuis le décès du grevé, et que l'héritier ou légataire du grevé est tenu de rendre compte des fruits et revenus. (C. C. 985.)—MATHIEU, J.—*Joubert & Walsh*, 12 R. L., p. 334.—C. R.—28 L. C. J., p. 39, M. L. R., 1 S. C., 85, 7 L. N., p. 134.

963. If, by reason of a pending condition or some other disposition of the will, the opening of the substitution do not take place immediately upon the death of the institute, his heirs and legatees continue, until the opening, to exercise his rights, and remain liable for his obligations.—Pothier, *Subst.*, 563 ; Thév.-d'Ess., *Subst.*, c. 30 ; Thév.-d'Ess. (Can. Ed.), 149-168. [II. 393.]

964. The legatee who is charged as a mere trustee, to administer the property and to employ it or deliver it over in accordance with the will, even though the terms used appear really to give him the quality of a proprietor subject to deliver over, rather than that of a mere executor or administrator, does not retain the property in the event of the

Digitized by Google

lapse of the ulterior disposition, or of the impossibility of applying such property to the purposes intended, unless the testator has manifested his intention to that effect. The property in such cases passes to the heir or the legatee who receives the succession.—Ricard, *Subst.*, part. 1, nn. 752-3-4 ; Thév.-d'Ess., *Subst.*, nn. 536, 539 ; Thév. d'Ess. (Can. Ed.), 163. [II. 393.]

965. The institute or his heirs deliver over the property together with its accessories; they render the fruits and interest accrued since the opening, if they have received them, unless the substitute, after being put in default to accept or repudiate the legacy, has failed to assume his quality.—Pothier, *Subst.*, 560; Guyot, *Subst.*, 539; Thév.-d'Ess., *Subst.*, c. 69 ; Thév. d'Ess. (Can. Ed.), 322. [II. 393.]

966. [If the institute were a debtor or a creditor of the grantor, and in consequence of his accepting as heir, as universal legatee, or as legatee by general title, confusion take place so as to destroy his debt or his claim, such debt or claim, notwithstanding such confusion which is deemed to be only temporary, revives between the substitute and the institute or his heirs, when the property comes to be delivered, over; except as to interest up to that time for which the confusion still holds.

The institute or his heirs are entitled to the separation of property in the prosecution of their claim, and may retain the property until they are paid.]—Guyot, *Subst.*, 540 ; Thév.-d'Ess., *Subst.*, c. 53, 54, 55, 56; *Contrà* as to the credit : Ricard, *Subst.*, c. 12, n. 71 ; 2 Bourjon, 161 ; Thév. d'Ess. (Can. Ed.) 263. [II. 395.]

967. Institutes under age, interdicted, or unborn, or under coverture, are not relievable from the non-fulfilment of the obligations imposed upon them, or upon their husbands, tutors or curators for them, by this and the preceding section; saving their recourse.—2 Ricard, *Subst.*, part. 2, nn. 133-4; Pothier, *Subst.*, p. 496; C. N., 1074 ; Thév. d'Ess. (Can. Ed.), 322. [II. 395.]

SECTION V—OF THE PROHIBITION TO ALIENATE.

968. The prohibition to alienate contained in a deed may, in certain cases, be connected with a substitution or may even constitute one.

It may also be made for other motives than that of substitution.

Digitized by Google

It may be stated in express terms, or may result from the conditions and circumstances of the act.

It includes the prohibition to hypothecate.

In gifts *inter vivos* the undertaking by the donee not to alienate has the same effects as the prohibition by the donor.—*ff* L. 134, *de legatis.*, 1, L. 38, *ibid.*, 3 ; Cod., L. 4, *de condict. ob causam ;* Ricard, *Subst.*, part. 1, nn. 333 et seq. 369 ; 3 Henrys, liv. 5, c. 4, *quest.* 49 ; 2 Bourjon, 164 ; Domat, *Subst.*, tit. 3, sec. 2, n. 5, and preface to book 5 ; *Legs*, tit. 2, sec. 1, n. 3 ; N. Den., *Défense d'aliéner*, § 1 ; Pothier, *Subst.* 499 ; Thév. d'Ess. (Can. Ed.), 83. [II. 395.]

DECISIONS :—1. In a deed of gift, the prohibition to alienate in the following terms:—"This donation made upon the express condition, that the lands "given shall remain *propres* to the donee and to his immediate heirs *de son côté* "*et estoc*, without the power of either selling or mortgaging the same" is obligatory, and consequently the hypothecs granted by the donee, are null.—C. R.—*Fafard vs Bélanger*, 4 L. C. R., p. 215.

2. A donor may legally impose as a condition of a donation of immoveables which he makes, a clause that the donee will not dispose of the immoveables during the life of the donor and of his wife; and a legacy of such immoveables by the donee, dying during the life time of the donor without children, in favor of his wife, is null and of no effect.—Q. B.—*Bourassa & Bédard*, 13 L. C. R., p. 251.

3. The prohibition to alienate contained in a will, whereby it is provided that the legatees, children of the testator, should in no manner charge, incumber, hypothecate, sell, barter or otherwise alienate the real estate to them bequeathed, until the expiration of twenty years after the decease of the testator, is valid, and is neither impossible nor prohibited by law nor *contra bonos mores*.—Q. B.—*Guillet dit Tourangeau & Rénaud*, 13 L. C. R., p. 278.

Reversed in Privy Council.—See decision noted at length at C. C. 831, n. 7, in the case of *Rénaud & Guillet dit Tourangeau*.

4. La défense d'aliéner et l'insaisissabilité portées à un acte de donation, ne peuvent être invoquées dans le cas de réparations nécessaires faites pour augmenter la valeur et le revenu de la chose donnée. Le bail pour neuf années ne comporte pas une aliénation.—BEAUDRY, J.—*Valois vs Gareau*, 2 R. L., p. 131.

5. Le légataire peut disposer des choses qui lui ont été léguées à titre d'aliments, à la condition de ne pouvoir être saisies, sans cependant qu'il y ait défense de les aliéner.—BEAUDRY, J.—*Armstrong vs Dufresnay*, 3 R. L., p. 366.

969. The cause or consideration of the prohibition to alienate, may be the interest either of the party disposing, or of the party receiving, or it may be that of the substitutes, or of third parties.—As to the Roman law on this subject, see Pothier, *Pandectes*, vol. 12, pp. 245-252 ; Ricard, *Subst.*, part. 1, n. 333 ; *Donations*, part. 1, n. 1044 ; Thév. d'Ess. (Can. Ed.) 84. [II. 395.]

970. The prohibition to alienate things sold or conveyed by

Digitized by Google

purely onerous title is void.—N. Den., *Défense d'aliéner*, § 1, n. 1 ; Thév. d'Ess. (Can. Ed.), loc. cit. [II. 395.]

DECISIONS :—1. Une vente d'immeuble à la charge d'une rente viagère est susceptible des mêmes modalités qu'une donation onéreuse.—Dans une telle vente, la prohibition d'aliéner peut être valablement imposée à l'acquéreur, avec clause résolutoire en cas de contravention.—Une telle vente ou donation onéreuse peut être résolue du consentement mutuel du vendeur ou donateur et de l'acquéreur, à l'encontre des intérêts des tiers.—Cette résolution volontaire est valable, à l'encontre des tiers, lors même qu'elle ne paraît pas avoir été causée par l'événement prévu par la clause résolutoire.—Une rétrocession de la part de l'acquéreur ou donataire, pour bonne et valable considération, a le même effet, à l'égard des tiers, qu'une résolution prononcée en justice.—*Specialiter :* L'hypothèque créée en faveur d'un des tiers par l'acquéreur ou donataire, pendant sa possession, est anéantie par cette résolution volontaire, quoique non causée par l'événement résolutoire, et quoique faite sous forme de rétrocession, pour bonne et valable considération.—Q. B.—*Lynch & Hainault*, 5 L. C. J., p. 306.

2. La prohibition d'aliéner portée dans un acte de donation à la charge d'une rente viagère n'est valide que pour la partie constatée par experts être à titre gratuit, et une expertise sera ordonnée pour établir la partie gratuite et la partie onéreuse de la donation.—Loranger, J.—*Peltier vs Debusat*, 5 R. L., p. 57.

3. Que l'obligation de donner l'immeuble vendu à un des enfants de l'acquéreur, issus de son mariage avec la fille du vendeur, contenue dans un acte de vente de cette immeuble, lequel acte de vente contient en même temps une donation à sa fille, l'épouse de l'acquéreur, qui est en communauté de biens avec lui, de la moitié du prix de vente, est nulle, vû qu'elle constitue une prohibition d'aliéner la chose vendue à titre purement onéreux quant à ce qui concerne l'acquéreur.—McCord, J.—*Salois vs Neveu*, 10 R. L., p. 72.

4. The deed in question being on its face a purely onerous title, the prohibition to alienate contained therein was void.—Supreme Court.—*Jones & Fraser*, 4 S. C. R., p. 515, C. D., p. 131.

971. The prohibition to alienate may be simply confirmatory of a substitution.

It may constitute one, although express terms be not used, according to the rules hereinafter laid down—Thév. d'Ess. (Can. Ed.), loc. cit. [II. 395.]

972. [Although the motive of the prohibition to alienate be not expressed, and it be not declared under pain of nullity or some other penalty, the intention of the party disposing suffices to give it effect, unless the expressions are evidently within the limits of mere advice.

When the prohibition is not made for another motive, it is interpreted as establishing in favor of the party disposing and his heirs a right to get back the property.]—N. Den. loc. cit., n. 3 ; Thév. d'Ess. (Can. Ed.) loc. cit. [II. 397.]

Digitized by Google

DECISIONS:—1. That even under the law before the promulgation of the Civil Code, a prohibition to alienate, imposed under a condition of forfeiture of the property given, cannot be deemed a *nudum præscriptum*, and effect must be given to it according to the will of the testator.—MEREDITH, C. J.—*Bourget vs Blanchard*, 7 Q. L. R., p. 322.

2. Qu'une donation faite avant le code, avec prohibition au donataire et à ses héritiers d'aliéner du vivant du donateur, sous peine de nullité, n'empêche pas le donataire de léguer les biens donnés à l'un ou plusieurs de ses héritiers; que ce legs n'est pas une aliénation et que, sous ce rapport, il diffère du legs des mêmes biens fait par le donataire à un étranger.—Que la violation de cette condition ne peut profiter qu'au donateur, et qu'elle ne peut pas être invoquée par un donataire, ni lui servir pour revendiquer la partie des biens que son co-donataire a aliénée.—CASAULT, J.—*Penisson vs Penisson*, 6 Q. L. R., p. 239.—Q. B.—9 Q. L. R., p. 122.

See also cases noted at C. C., 975.

973. If the prohibition to alienate be made in favor of persons who are designated, or who may be ascertained, and who are to receive the property after the donee, the heir, or the legatee, a substitution is created in favor of such persons, although it be not in express terms. —Pothier, *Subst.*, 499, 517, 518 ; Thev. d'Ess. (Can. Ed.) 84. [II. 397.]

974. When the prohibition to alienate extends to several degrees and is at the same time interpreted as implying a substitution, those to whom the prohibition successively applies after the first who receives, become substitutes in turn, as if they were the subject of express dispositions. — 2 Ricard, *Subst.*, part. 1, n. 397 ; Thev. d'Ess. (Can. Ed.) 84. [II. 397.]

975. The prohibition to alienate may be confined to acts *inter vivos*, or to acts in contemplation of death, or may extend to both, or may be otherwise modified according to the will of the party disposing. Its extent is determined according to the object which the party disposing had in view, and the other attending circumstances.

If there be no restriction, the prohibition is deemed to cover acts of every description.—2 Ricard, *Subst.*, part. 1, nn. 340 et seq. ; Thev. d'Ess. (Can. Ed.) 84. [II. 397.]

DECISIONS:—1. A donor may legally impose as a condition of a donation of immoveables which he makes, a clause that the donor will not dispose of the immoveables during the life time of the donor and of his wife, and a legacy of such immoveables by the donee dying during the lifetime of the donor without children in favor of his wife is null and of no effect.—Q. B.—*Bourassa & Bédard*, 13 L. C. R., p. 251, 7 L. C. J., p. 158.

2. La prohibition d'engager ou d'hypothéquer des biens substitués, légués comme aliments, n'empêche pas le grevé de les engager ou hypothéquer dans le but de les protéger contre une aggression tendant à en dépouiller le grevé, et la validité de l'hypothèque consentie par le grevé pour cet objet, n'est pas affectée

Digitized by Google

par l'insuccès des mesures adoptées pour empêcher la vente qui menace d'en dépouiller le grevé. En d'autres termes: *Jugé*, que l'avocat qui représente le propriétaire d'un bien déclaré alimentaire, inaliénable et insaisissable, pour tenter de le conserver au légataire, acquiert contre ce dernier une créance alimentaire pour la répétition de ses déboursés et honoraires;—les admissions du propriétaire de biens déclarés alimentaires, si elles ne sont pas entachées de collusion, font preuve contre lui du caractère alimentaire de la créance, au paiement de laquelle on oppose la prohibition d'hypothéquer ou aliéner, contenue dans un testament;—la dette hypothécaire due par le curateur à la substitution et née de la défense des biens de la substitution, n'est pas contestable par le grevé, sur le motif que les biens lui ont été légués en usufruit et ont été déclarés inaliénables et insaisissables, pour lui sauver des aliments.—C. R.—*Wilson vs Leblanc*, 16 L. C. J., p. 197.

3. La prohibition d'aliéner, portée dans un acte de donation à la charge d'une rente viagère, n'est valide que pour la partie constatée par experts être à titre gratuit et une expertise sera ordonnée pour établir la partie gratuite et la partie onéreuse de la donation.—LORANGER, J.—*Peltier vs Debusat*, 5 R. L., p. 57.

4. Que la prohibition d'aliéner contenue dans une donation d'un immeuble faite par le père à son fils dans le contrat de mariage de ce dernier " à la charge " de ne pouvoir vendre, échanger ou autrement aliéner le dit immeuble, sans " exprès consentement, et par écrit du donateur," comprend en termes exprès, toute aliénation par vente, cession, échange ou autrement, et qu'en vertu des articles 972 et 975 C. C., une telle prohibition, faite sans restriction, est censée s'étendre à toutes aliénations, soit par acte entrevifs ou à cause de mort, et doit être interprétée comme constituant un droit de retour en faveur du donateur.—Q. B.—*Pepin & Courchêne*, 10 R. L., p. 77, 2 L. N., p. 397.

See also cases noted at C. C. 972.

976. The simple prohibition to dispose of property by will, without other condition or indication, implies a substitution in favor of the natural heirs of the donee, or of the heir or legatee, for so much of the property as may remain at the death of such donee, heir or legatee.—Pothier, *Subst.*, 518; Thev. d'Ess. (Can. Ed.) 87. [II. 397.]

977. The prohibition to alienate out of the family, either of the party disposing or of the party receiving, or out of any other family, does not, in the absence of expressions denoting continuance, extend to others than those to whom it is addressed; the persons belonging to the family who take after them are not subject to it.

If the prohibition be addressed to no person in particular, it is deemed, in the absence of such expressions, to apply only to the person first benefited.

Substitutions made in a family are in all cases interpreted according to the same rules.—Ricard, *Subst.*, part 1, n. 488, 493, 516; Thév. d'Ess., *Subst.*, n. 356, 357, 358 et seq., 363 et seq., 953-959; Thev. d'Ess. (Can. Ed.) 84. [II. 397.]

Digitized by Google

978. The prohibition to alienate out of the family, when no dispositions require the following of the legitimate order of succession, or any other order, does not prevent the alienation, by gratuitous or onerous title, made in favor of the more distant members of the family.—Thév. d'Ess., *loc. cit.* ; Thev. d'Ess. (Can. Ed.) 85. [II. 397.]

979. The term *family* when it is not limited, applies to all the relatives in the direct or collateral line belonging to the family, who come by successive degrees according to law or to the order indicated, without however representation being allowed otherwise than in the case of legacies.—Ord. des Subst., tit 1, art. 21, 22 ; Pothier, *Subst.*, 512, 513, 514 ; Thev. d'Ess. (Can. Ed.) 85. [II 399]

980. In the prohibition to alienate, as in substitutions, and in gifts and legacies in general, the terms *children* or *grand-children*, made use of without qualification either in the disposition or in the condition, apply to all the descendants, with or without the effect of extending to more than one degree according to the terms of the act. —Ricard, *Subst.*, part. 1, nn. 503 et seq.; Thév. d'Ess., *Subst.*, nn. 367 et seq. ; Pothier, *Subst.*, p. 509 ; 7 Décisions des Tribunaux (L. C. R.) p. 351, 9 do, p. 376, 11 do, p. 84, *Martin & Lee ;* 6 Guyot, *Rép.*, 718 et seq. ; Thev. d'Ess. (Can. Ed.) 85. [II. 399.]

DECISIONS:—1. In the case submitted, a legacy by which the testatrix made a bequest to all her children living at the time of her decease, does not include her grandchildren, issue of one of her children who died before the making of the will. *Semble :* A more comprehensive meaning is frequently given by the old French law which prevails in Canada to the word *enfants* than is generally given by the English law to the word *children*.—PRIVY COUNCIL.—*Martin & Lee*, 11 L. C. R., p. 84, 14 Moore P. C. Rep., p. 142.—Q. B.—9 L. C. R., p. 376.

2. Le mot *enfant*, employé en matière de succession testamentaire et de substitution en ligne descendante, comprend, par sa propre énergie, non seulement les enfants de l'instituant ou de l'institué, suivant le cas, mais encore leurs descendants dans tous les degrés, sur la défaillance du degré indiqué dans la disposition, le degré le plus prochain devant néanmoins exclure les autres.—LORANGER, J.—*Brunette vs Péloquin*, 3 R. L., p. 52.

3. That the expression "*enfants*" in a donation creating a substitution in their favor, includes "*les petits enfants*," in the absence of any express limitation in the deed in favor of the children only.—C. R.—*Joubert & Walsh*, 28 L. C. J., p. 39, M. L. R., 1 S. C., p. 85.—MATHIEU, J.—7 L. N., p. 134, 12 R. L., p. 334.

4. Que la désignation des appelés par les mots "*enfants nés de mon mariage*," dans un testament créant une substitution, est la manifestation de l'intention du testateur que représentation ait lieu, et qu'il faut des termes clairs et précis pour ôter au mot "*enfants*" cette signification que lui donne expressément la loi.—C. R.—*Marcotte vs Noël*, 6 Q. L. R., p. 245.

Digitized by Google

5. Que la disposition d'un testament, fait en 1831, par laquelle le testateur lègue ses biens à ses enfants, à diviser également entre eux, et leur défend expressément d'engager, aliéner et hypothéquer ses biens en aucune manière, non plus que la jouissance, pour que ces biens retournent à leurs enfants nés en légitime mariage à diviser entre eux, ou en cas qu'ils décèdent, ou aucun d'eux, sans enfant, leur part devant être répartie entre les autres héritiers ou légataires du testateur, indique que les biens doivent être déférés, au cas susdit, suivant l'ordre des successions légitimes, et qu'il y a lieu à la représentation au cas du décès d'un des frères sans enfant.—MATHIEU, J.—*Cie de Dépôt et de Prêt du Canada vs Chevalier*, 16 R. L., p. 334.

981. [Prohibitions to alienate, although not accompanied by substitution, must be registered, even as regards moveable property, in the same manner as substitutions themselves.

The person thus prohibited and his tutor or curator, and the husband in the case of a married woman, are bound to effect such registration.] Thev. d'Ess. (Can. Ed.) 85. [II. 399.]

Amendment . See the Act intituled " An Act respecting Trusts." Q. 42-43 Vict., cap., 29, as amended by the Act Q. 46 Vict., cap. 24, noted at C. C., 294.

TITLE THIRD.

OF OBLIGATIONS.

GENERAL PROVISIONS.

982. It is essential to an obligation that it should have a cause from which it arises, persons between whom it exists, and an object. —Pothier, *Obligations*, n. 1. [I. 37.]

DECISION :—Les promesses de mariage, formant de véritables obligations de faire, produisent tous les effets des obligations de faire ordinaires, et sont soumises aux mêmes règles.—Elles ont effet aussi bien contre une fille majeure, qui a fait une telle promesse que contre un garçon, quand elles sont discontinuées sans causes légitimes.—Les dommages résultant de la non-exécution d'une promesse de mariage, ne sont pas seulement les dommages réels, mais peuvent être même les dommages exemplaires, suivant le cas.—Ceux qui sans causes, dans un but malicieux ou par fraude ou dol, conseillent à des fiancés de briser leur promesse, sont aussi passibles des dommages résultant de cette inexécution.—BERTHELOT, J.—*Mathieu vs Laflamme*, 4 R. L., p. 371.

Digitized by Google

983. Obligations arise from contracts, quasi-contracts, offences, quasi-offences, and from the operation of the law solely.—Instit., lib. 3, tit. 14, §§ 1, 2 ; Pothier, *Oblig.* 2. [I. 37.]

CHAPTER FIRST.

OF CONTRACTS.

SECTION I.—OF THE REQUISITES TO THE VALIDITY OF CONTRACTS.

984. There are four requisites to the validity of a contract :

Parties legally capable of contracting ;

Their consent legally given ;

Something which forms the object of the contract ;

A lawful cause or consideration.—*ff* L. 1, §§ 2, 3, L. 7, § 4, *De pactis* ; Pothier, *Oblig.*, 2 ; Domat, liv. 1, tit. 1, sec. 1, §§ 3, 4, 5 et seq.; C. N., 1108 ; C. L., 1772. [I. 37.]

DECISION :—Lorsqu'il existe un contrat entre les parties, le défendeur qui plaide des moyens tendant à faire rescinder le contrat, ne peut conclure simplement au débouté de l'action, mais doit demander la résolution du contrat.—BEAUDRY, J.—*Frigon vs Bussel*, 5 R. L., p. 559.

§ 1. *Of the legal capacity to contract.*

985. All persons are capable of contracting, except those whose incapacity is expressly declared by law.—Domat, liv. 1, tit. 1, sect. 2, § 1 ; *ff* L. 1, *De pactis* ; C. N., 1123. [I. 37.]

986. Those legally incapable of contracting are :

Minors in the cases and according to the provisions contained in this code.—Pothier, *Oblig.*, 52 ; Domat liv. 1, tit 1, sec. 5, nn. 4 et seq. and notes ; 4 Boileux, pp. 374-6. [I. 37.]

Interdicted persons.—*ff* L. 40, *De reg. jur* ; Pothier, *Oblig.*, 50 ; Domat, liv. 1, tit. 2, sec. 2, § 10. [I. 37.]

Married women, except in the cases specified by law.—Pothier, *Oblig.*, 50 ; *Cout. de Paris*, art. 223, 234. [I. 37.]

Those who, by special provisions of law, are prohibited from contracting by reason of their relation to each other, or of the object of the contract ;

Digitized by Google

Persons insane or suffering a temporary derangement of intellect arising from disease, accident, drunkenness or other cause, or who by reason of weakness of understanding are unable to give a valid consent.—Domat, liv. 1, tit. 2, sec. 1, § 11; Pothier, *Oblig.*, 51, 49; *ff* L. 40, *De reg. jur.*—*Furiosus nullum negotium contrahere potest.* [I. 37 to 39.]

Persons civilly dead.—Domat, liv. 1, prélimin., tit. 2, sec. 1, §§ 12, 13; C. N., 1124; 3 Savigny, *Droit Romain*, p. 90. [I. 39.]

DECISIONS:—1. The contract of a minor is not *nul de plein droit*—K. B.—*Casgrain vs Chapais*, 2 R. de L., p. 206.

2. Un défendeur, poursuivi sur un billet qu'il a consenti étant encore mineur, ne peut faire renvoyer l'action en plaidant le seul fait qu'il était mineur lorsqu'il a consenti le billet, mais pour réussir il doit encore demander par sa défense à être relevé de l'obligation qu'il a contractée durant sa minorité, en alléguant qu'il a été lésé et de quelle manière il a été lésé.—LORANGER, J.—*Cartier vs Pelletier*, 1 R. L., p. 46.

3. C'est au demandeur qui veut recouvrer de l'argent prêté à un mineur à prouver l'emploi utile de l'argent.—TASCHEREAU, J.—*Miller vs Demeule*, 18 L. C J., p. 12.

4. A plea alleging minority without alleging lesion, is bad.—MEREDITH, J.—*Bluteau vs Gauthier*, 1 Q. L. R., p. 187.

5. Il ne suffit pas de plaider minorité à une action sur billet promissoire consenti par un mineur, mais il faut aussi plaider lésion.—DOHERTY, J.—*Boucher vs Girard*, 20 L. C. J., p. 134.

6. Une obligation consentie par un mineur émancipé, en vertu d'une autorisation judiciaire, n'est pas nulle par le fait que le mineur aurait stipulé dans l'acte que le montant du capital deviendrait exigible si l'intérêt n'était pas payé tous les six mois, lorsque l'autorisation judiciaire ne fait pas mention de telle stipulation, mais au contraire autorise le prêt pour 18 mois.—L'intérêt au taux de dix par cent l'an payable par un mineur, peut n'être pas exorbitant suivant les circonstances.—Q. B.—*Wates & Paquette*, 9 R. L., p. 253.

7. The incapacity of a minor being established in his favor and not against him, the result of this incapacity is not that the minor cannot contract, but only that he cannot be injured by his contract, and when a minor is sued upon his contract, he cannot be relieved from it by simply pleading his minority, but he must also plead and prove that he has been injured by the contract.—C. R.—*Gagnon vs Sylva dit Portugais*, 24 L. C. J., p. 251.

8. Un acte notarié consenti dans un état d'ivresse causé par le dol pratiqué par l'autre partie contractante, est sujet à rescision.—TORRANCE, J.—*Verdon vs Verdon*, 13 L. C. J., p. 223.

9. Qu'une corporation municipale, qui, par l'entremise de son conseil, se serait engagée à donner un contrat à une société, n'est pas tenue de donner ce contrat à un tiers que cette société s'est substitué, sans le consentement de la corporation.—CHAGNON, J.—*St James vs Corporation du Village de St Gabriel*, 12 R. L., p. 15.

For cases as to ability of corporation to transact certain affairs, see cases noted at C. C. 358 *et seq.*

Digitized by Google

10. The incapacity arising from insanity only begins from the date of the interdiction, and up to that time, the interdict remains, as regards third persons, at the head of his patrimony and preserves the gestion thereof, and third persons, not having quality to demand the interdiction, are entitled to serve all necessary notice and signification on the interdict prior to his actual interdiction (C. C. 335.)—JETTÉ, J.—*Symes vs Farmer*, 27 L. C. J., p. 185.

11. In the present case there was nothing to show that the act sought to be set aside, and which was done some months before the interdiction of the grantor, should be annulled. (C. C. 335.)—Q. B.—*Bouvier & Collette*, 31 L. C. J., p. 14.—CIMON, J.—14 R. L., p. 97.

See also cases noted at C. C. 335 and 987.

987. The incapacity of minors and of persons interdicted for prodigality, is established in their favor.

Parties capable of contracting cannot set up the incapacity of the minors or of the interdicted persons with whom they have contracted. —Domat, liv. 1, tit. 1, sec. 5, § 7.—Domat., liv. 20, tit. 1, sect. 2, no 10; *ff* L. 13, § 19, *De act. empt. et vend.; ff* L. 6, L. 7, L. 44, *De minoribus;* Pothier, *Oblig.* 52; Meslé, c. 14, n. 28; *ff* L. 5, § 1, L. 9, *in principio, De auctoritate et consensu tutorum;* C. N., 1125. [I. 39].

DECISIONS:—1. La nullité qui frappe les obligations des mineurs ou de leurs tuteurs agissant sans l'autorisation du conseil de famille, n'est qu'une nullité relative, bien qu'elle puisse être demandée de plein droit par le mineur, c'est-à-dire sous preuve de lésion. Elle est relative en ce sens que le mineur seul peut la demander, et non les parties avec lesquelles lui ou son tuteur ont contracté. Ces obligations sont susceptibles d'être cautionnées, pourvu qu'elles ne soient pas pas atteintes d'un vice radical réprouvé par la morale ou le droit public.—C. R.—*Vernier vs Lortie*, 1 Q. L. R., p. 234.

2. The maker of a promissory note, though a minor, may be sued upon a note, the consideration of which was goods purchased by him for use in his trade. —MACKAY, J.—*City Bank vs Lafleur*, 20 L. C. J., p. 131.

3. A mortgage given by a minor is not radically null, but is merely subject to be annulled in case of *lésion*.—C. R.—*Béliveau vs Duchesneau*, 22 L. C. J., p. 168 & 37.

See also cases noted at C. C. 986.

§ 2. *Of consent.*

988. Consent is either express or implied. It is invalidated by the causes declared in the second section of this chapter.—Pothier, *Oblig.*, 16, 17. [I. 39.]

DECISIONS:—1. It will be observed that when the law declares consent to be of the essence of the contract, it does not refer to the consent of the mind, but to the declaration of consent, or, as some of the modern writers style it "la déclaration de volonté."—RAMSAY, J. *loq*—Q. B.—*Coté & Stadacona Insurance Co.*, 6 Q. L. R., p. 154.

Digitized by Google

2. The offer of a creditor to accept an amount previously tendered by his debtor, if not promptly acted upon by the debtor, may be revoked.—Q. B.—*Snowdon & Nelson*, 3 L. N., p. 210.

§ 3. *Of the cause or consideration of contracts.*

989. A contract without a consideration, or with an unlawful consideration has no effect; but it is not the less valid though the consideration be not expressed or be incorrectly expressed in the writing which is evidence of the contract.—*ff* L. 7, §§ 4, 7, L. 27, § 4, *De pactis ;* Pothier, *Oblig.* 42, 43, 753 ; *ff* L. 26, § *ult. de prob.*, 23, 3 ; Domat, liv. 1, tit. 1, sect. 5, n. 13 ; Domat., liv. 1, tit. 1, sect. 1, nn. 5, 6 ; 6 Toullier, nn. 175, 176, 177 ; 4 Marcadé, n. 456 ; C. N., 1131, 1132. [I. 39.]

DECISIONS:—1. Marriage is a good consideration for *bona fide* stipulations in a contract of marriage in favor of a wife.—BOWEN & BADGLEY, JJ.—*Barbour vs Fairchild*, 6 L. C. R., p. 113.

2. A promissory note or any consideration given by an insolvent debtor to a creditor, in contemplation of a deed of composition, and as a preference to such creditor, without the knowledge of the other creditors, is null and void, and will be declared so even as against the compounding debtor himself.—BADGLEY, J.—*Greenshields vs Plamondon*, 3 L. C. J., p. 240.

3. A promissory note made as an indemnity for assuming liability for a third party at the request of the maker, is valid as such indemnity. The party indemnified may sue as soon as troubled. and before paying the debt for which he has become liable.—BERTHELOT, J.—*Perry vs Milne*, 5 L. C. J., p. 121.

4. A promissory note given in payment of a bet respecting an election of a member of parliament is illegal and null.—BRUNEAU, J.—*Dufresne vs Guévremont*, 5 L. C. J., p. 278.

5. A deed of donation being valid, a promise therein contained to ratify the same at a certain time is obligatory and cannot be avoided on the ground of there being no consideration for such promise.—MONK, J.—*Easton vs Easton*, 7 L. C. J., p. 138.

6. That a contract for a lawful consideration is not the less valid though the consideration be not correctly expressed therein.—Q. B.—*O'Brien & Thomas*, 24 L. C. J., p. 43.—TORRANCE, J.—21 L. C. J., p. 287.

7. A natural or simple moral obligation is sufficient to make a donation an onerous contract (C. C. 1592.)—C. R.—*Drouin vs Provencher*, 9 Q. L. R., p. 179.

See also cases noted at C. C., 990 *et seq.*

990. The consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order.—*ff* L. 7, § 7, *De pactis ;* Pothier, 43 ; C. N., 1133. [I. 39.]

DECISIONS:—1. A promissory note to a creditor for the balance of his claim, in consideration of his having signed a deed of composition, is void.—K. B.—*Blackwood vs Chinic*, 2 R. de L., p. 27.

2. The giving of a promissory note by an insolvent to one of his creditors, for the purpose of inducing him to sign a deed of composition is a fraud upon

Digitized by Google

the other creditors, and such note cannot be made the ground of an action against the insolvent.—Q. B.—*Sinclair & Henderson*, 1 L. C. L. J., p. 54.

3. A note of a third party, given by an insolvent to a creditor, to obtain the creditor's consent to the discharge of the insolvent, is null and void.—Q. B.—*Doyle & Prévost*, 17 L. C. J., p. 307.

4. Similar decision.—Q. B.—*Prévost & Pickel*, 17 L. C. J., p. 314.

5. A note given to a creditor to induce him to sign a deed of composition, or the note given in renewal of such note, is null, and the nullity may be pleaded by the maker to an action by the creditor.—JOHNSON, J.—*McDonald vs Senez*, 21 L. C. J., p. 290.

6. A note given either by an insolvent or by a creditor to induce the payee to consent to the insolvent's discharge is null.—C. R.—*Decelles vs Bertrand*, 21 L. C. J., p. 291.

7. Where a debtor setling with his creditors for 50c. secured, privately gave some of them unsecured notes for the balance to obtain their assent to the composition, held, that the endorser of the composition notes was freed from liability.—Q. B.—*Arpin & Poulin*, 1 L. N., p. 290.

8. An action cannot be maintained upon a promissory note if it be proved that it was given and the proceeds thereof applied to bribe the electors of a county.—Q. B.—*Gugy & Larkin*, 7 L. C. J., p. 11.

9. *Held*:—(By Dorion, C. J., Monk & Sanborn, JJ.,) that the costs of an election feast, after an election (in 1867) had been closed, are not recoverable.—Q. B.—*Guévremont & Tunstall*, 21 L. C. J., p. 293.

10. The supply of refreshments to a gang of men collected during an election of a representative to the Commons of Canada, to be used in case of an emergency, gives rise to no action at law for payment of the refreshments.—TORRANCE, J.—*Johnson vs Drummond*, 17 L. C. J., p. 176.

11. Une promesse faite par un enchérisseur à un autre enchérisseur, à uné vente judiciaire, de lui payer une certaine somme pour lui faire cesser ses enchères, constitue une obligation illicite, et la somme ainsi promise ne peut être recouvrée en justice.—SICOTTE, J.—*Perrault vs Couture*, 16 L. C. J., p. 251.

12. La convention entre deux personnes, que l'une d'elles enchérira sur une propriété devant être vendue par le shérif, jusqu'à un certain montant et ensuite la revendra à l'autre, est parfaitement licite et ne peut invalider le décret.—C. R.—*Grenier vs Leroux*, 22 L. C. J., p. 68.

13. An action against a tutor for the non-performance of a contract by which he undertook to marry his ward to the plaintiff cannot be maintained.—K. B.—*Chabot vs Morisset*, 2 R. de L., p. 79.

14. No rent can be recovered by an action at law, for premises leased for the purpose of keeping a house of ill-fame.—BRUNEAU, J.—*Garish vs Duval*, 7 L. C. J., p. 127.

15. Un billet à ordre consenti pour dette de jeu est nul, quoique transparté à un tiers de bonne foi et avant échéance.—SMITH, J.—*Biroleau vs Derouin*, 7 L. C. J., p. 128.

16. A transfer of litigious rights, made on condition that the assignee shall bear the costs and share in the amount to be recovered, is void as being against law and public policy, and the assignee cannot maintain an action on such transfer.—Q. B.—*Power & Phelan*, 4 Q. B. R., p. 57.

Digitized by Google

17. Qu'une convention par laquelle un entrepreneur s'oblige à payer une commission sur une certaine somme à une personne qui lui fournit un cautionnement en faveur du gouvernement, avec lequel il a un contrat, est légale et sera mise à exécution.—C. R.—*Devlin vs Beemer*, 10 R. L., p. 681.

18. An agreement between a registrar and another person to the effect that, on the registrar resigning his office so as to allow that other person to be appointed in his place, the new registrar should pay to his predecessor one-half yearly of his fees of office, is null and void.—CASAULT, J.—*Thurber vs Lemay*, 9 L. N., p. 188.

19. Where an action brought by a transferee was dismissed, on the ground that the consideration of the transfer was champertous, the transferor regained his rights and might institute the action in his own name.—LORANGER, J.—*Higgins vs Power*, M. L. R., 1 S. C., p. 268.

20. Que l'action prise au nom du créancier, mais aux frais d'un tiers, qui doit en partager le produit, devant sa naissance à une convention illégale et prohibée, doit être renvoyée.—C. R.—*Dussault vs Compagnie du chemin de fer du Nord*, 11 Q. L. R., p. 165.

21. *But in Appeal it was held:* Que dans l'espèce actuelle, le droit d'action de l'appelant, ne découlant pas du prétendu contrat de "champerty" entre l'appelant et un tiers, son beau-frère, il n'y a pas lieu d'absoudre l'intimée de l'obligation de réparer le tort causé à l'appelant résultant du quasi délit commis par l'intimée.—Q. B.—*Dussault vs Compagnie du chemin de fer du Nord*, 12 Q. L. R., p. 50, 14 R. L., p. 207.

22. See case noted at C. C., 1062.—MEREDITH, J.—*Couture vs Marois*, 5 Q. L. R., p. 96.

23. A contract by which a doctor sells his practice to another doctor and undertakes to introduce the latter to his patients and to help him to establish a practice, is not prohibited by law or contrary to good morals.—CASAULT, J.—*Verge vs Verge*, 14 Q. L. R., p. 227.

§ 4. *Of the object of contracts.*

See Chap. V. " Of the object of obligations. "

SECTION II.—OF CAUSES OF NULLITY IN CONTRACTS.

991. Error, fraud, violence or fear, and lesion are causes of nullity in contracts; subject to the limitations and rules contained in this code. [I. 39.]

DECISION:—A promissory note or agreement in writing dated on a Sunday and given in payment of the price of a horse purchased the same day, is null and void under the 45 Geo. III, cap. 10 and 18 Vict., cap. 11.—STUART, J.—*Coté vs Lemieux*, 9 L. C. R., p. 221.

§ 1. *Of error.*

992. Error is a cause of nullity only when it occurs in the nature of the contract itself, or in the substance of the thing which is

Digitized by Google

the object of the contract, or in some thing which is a principal consideration for making it.—Pothier, *Oblig.*, 17, 18; *ff* L. 116, § 2, *De reg. jur., Non videntur qui errant consentire.*; L. 57, *De obligation. et action*; C. N., 1110. [I. 39-41.]

DECISIONS:—1. The amount voluntarily paid on a protested bill of exchange, by the drawer, cannot be recovered on the ground of an error in the payment, in point of law.—K. B.—*Caldwell vs Patterson*, 2 R. de L., p. 27.

2. An error of law which entitles a party to be relieved of his act, is such an error as makes him do something because he believes he is compelled so to do, when in reality he is not.—C. R.—*Boston vs Leriger*, M. C. R., p. 110.

3. Il n'y a pas d'acquiescement lorsque l'offre du montant d'un jugement a été acceptée par erreur.—C. R.—*Jones vs Warmington*, 2 R. L., p. 188.

4. Le droit de demander la rescision d'un acte de vente, pour cause d'erreur, se prescrit par dix ans.—Routhier, J.—*Wainright vs Ville de Sorel*, 5 R. L., p. 668.

5. Que s'il appert par la preuve que dans l'intention des parties, une donation ne devait pas être gratuite, mais que le donataire devait se charger de payer au donateur sa part dans une succession, dont les biens donnés font partie, et que cette donation ait été faite dans ces termes, comme donation gratuite, elle sera annullée comme faite contrairement à l'intention des parties.—C. R.—*McCord vs McCord*, 11 R. L., p. 510.

6. The defendant, sued on a promissory note, pleaded in the first place, that the signature was a forgery, but, subsequently, he amended his plea and alleged that he signed the note by error, intending to give a receipt for the amount named therein. *Held:* That, in the case of an illiterate person, who signed by making his mark the change of defense was not an indication of bad faith and the evidence appearing to the Court to sustain the amended plea, the judgment dismissing the action was confirmed.—Q. B.—*Benoit & Brais*, 6 L. N., p. 342.

7. Qu'un acte de ratification d'une obligation pour prêt d'argent, consenti par un homme illettré, sera annulé, s'il est prouvé que cet acte ne lui a pas été lu, et s'il contient des obligations autres que celles que cette personne entendait consentir.—Que la preuve testimoniale est admise pour prouver l'erreur.—Mathieu, J.—*Compagnie de Prêt et de Crédit Foncier vs Santerre*, 14 R. L., p. 453.

8. An action was brought to recover the sum of $2,000 payable on a life insurance policy, according to its contents. It being shown that the insertion of the amount of $2,000 was an error and that the amount should have been $1,000, the action was maintained for that sum only.—Supreme Court.—*Ætna Life Insurance Company vs Brodie*, 5 S. C. R., p. 1.

9. Where an act of heirship involving the acceptance of a succession has been made by error of law, it forms no ground for setting aside the acceptance. (C. C. 650.)—Q. B.—*Betournay & Moquin*, 5 L. N., p. 327, 2 Q. B. R., p. 187.

10. Que lorsque, dans une vente d'effets déterminés, il y a erreur sur le prix de la part du vendeur qui, par inadvertance, demande moins que le prix courant, il n'y a pas lieu à la rescision de la vente, et celui ci sera obligné de délivrer les effets au prix convenu.—Casault, J.—*Morriset vs Brochu*, 10 Q. L. R., p. 104.

11. Qu'un reçu pour balance du prix de bois vendu, constate un règlement final, qui ne peut être mis de côté, sans alléguer l'erreur ou d'autres causes de nullité.—Q. B.—*Johnstone & McGreevy*, 1 Q. B. R., p. 299.

Digitized by Google

12. A bank paid a cheque to the order of Wm. Almour, which was endorsed "Wm. Almour by A. B. Almour" without the authority of A. B. Almour to endorse for Wm. Almour being shown:—It was held that the bank was responsible for the error.—C. R.—*Almour vs Jacques Cartier Bank*, M. L. R., 1 S. C., p. 142.

13. Que lorsqu'une assurance sur la vie d'une personne est faite pour un montant de $4,000 et qu'en calculant la prime annuelle de cette assurance, par une erreur du calcul, l'agent représente à l'assuré que la prime annuelle sera de $186.56, suivant les taux ordinaires de l'assurance et que l'assuré accepte et consent de payer cette prime pour laquelle il donne des billets pour la première année, la compagnie n'aura pas ensuite le droit de forcer l'assuré à payer les primes ordinaires par elle chargées, même s'il est prouvé que l'assuré connaissait les taux ordinaires pour une somme de $1,000 et si son consentement a été obtenu en vertu de cette erreur commune, mais que le seul droit de la compagnie d'assurance en ce cas serait de demander la nullité du contrat.—MATHIEU, J.—*Christmas vs Bordua*, 15 R. L., p. 534.

14. Que lorsqu'une partie a concouru à un acte entaché d'erreur et qu'elle est elle-même victime de l'erreur ou de la surprise, elle pourra demander la nullité du contrat qu'elle aura signé sous ses circonstances.—C. R.—*Foucault vs Foucault*, 31 L. C. J., p. 97.

15. Que la vente d'une recette non patentée pour manufacturer de la bière de gingembre est nulle s'il est prouvé qu'au temps de la vente le secret de cette recette était connue au public ; que sous ces circonstances le contrat doit être annulé, vu qu'il y a erreur sur une considération principale qui a engagé les parties à contracter.—MATHIEU, J.—*Perrault vs Normandin*, 31 L. C. J., p. 118.

16. Where work was executed by a firm of printers, duly registered, composed of three persons, they have a right to recover the value of such work, although the parties intrusting them with the work believed they were dealing with two members only of the firm who were at the same time carrying on business as a registered firm of publishers—more especially as the two persons composing the publishing firm were parties to the suit and similar work, previously executed by the printing firm on the order of the same agents, had been paid for on accounts rendered by the printing firm.—TAIT, J.—*Fulton vs Darling*, M. L. R., 3 S. C. p. 375.

§ 2. *Of fraud.*

993. Fraud is a cause of nullity when the artifices practised by one party or with his knowledge are such that the other party would not have contracted without them.

It is never presumed and must be proved.—Pothier, *Oblig.*, 29, 31-3; Domat, liv. 1, tit. 18, sec. 3, nn. 1, 3, *Id.*, tit. 1, sec. 6, n. 8; *ff* L. 7, § 9, *dolo*; C. N., 1116. [I. 41.]

DECISIONS:—1. A donation made by a weak and aged person for a small annuity, not exceeding half of the annual income of the property given, may be set aside for fraud, if the inference of fraud be not rebutted by evidence of circumstances which plainly show that it ought not to prevail.—K. B.—*Bernier vs Boiceau*, 2 R. de L., p. 209.

Digitized by Google

2. A title to moveables taken with knowledge of one previously given to another party by the same vendor is of no avail, but fraudulent.—BADGLEY, J.—*Russell vs Guertin*, 10 L. C. J., p. 133.

3. Il ne peut y avoir lieu à la rescision d'un contrat, pour cause de dol ou fraude, si les défauts dont se plaint la partie lésée, étaient ouverts et faciles à constater, et si ses objections ne portent que sur des incidents ou accessoires, ou des éventualités probables, et non sur la substance même de la chose. Lorsqu'il existe un contrat entre les parties, le défendeur qui plaide des moyens tendant à faire rescinder le contrat, ne peut conclure simplement au débouté de l'action, mais doit demander la résolution du contrat.—BEAUDRY, J.—*Frigon vs Bussell*, 5 R. L., p. 559.

4. L'engagement pris par un adjudicataire envers un créancier de lui payer sa créance à condition qu'il n'enchérisse pas, ne constitue pas le dol prévu par l'art. 714 C. P. C.—ROUTHIER, J.—*Lépine vs Barrette*, 5 R. L., p. 703.

5. The employment of one or more puffers at an auction sale renders it void, and the vendors cannot enforce the execution of the contract. An alleged custom of employing puffers, even if it existed, could not affect the case.—TORRANCE, J.—*Jetté vs McNaughton*, 19 L. C. J., p. 153.

6. By the majority of the Court (Monk, Ramsay and Tessier, JJ.) :—A single false bid on any lot sold destroys the consent of the purchaser of such lot and renders the sale null and void, even without proof of fraud and damage. The presence of false bidders who bid on some of the lots offered, does not annul the sale of a lot on which there was no false or by-bidding, unless the purchaser of such lot alleges and proves fraud on the part of the vendor, and damage to himself by the enhancement of the price above the current value.—By the minority (Dorion, C.J., and Sanborn, J.) :—Such by-bidding is a cause of nullity only where the purchaser shows that he has suffered damage therefrom. In this case, if there was by-bidding on any of the lots sold to the defendant, it caused him no damage, and therefore the sale should be enforced. By Ramsay, J. :—By-bidding, where extensively practised at an auction sale, is a fraudulent breach of the contract implied in a sale by auction, and therefore annuls the adjudications even of lots on which there was no by-bidding, unless the vendor clearly establishes that the purchaser was in no respect injured by the by-bidding at the sale generally.—Q. B.—*Jetté & McNaughton*, 20 L. C. J., p. 255.

7. That a Court of Justice will not give its aid to a person seeking to set aside his own solemn deed of sale, if it appear that he acquiesced in it for years, lying by, until by circumstances and the expenditure of capital, the subject matter of the sale had greatly increased in value and new interests had been created on it. He must sue promptly or explain the delay.—PRIVY COUNCIL.—*Guyon vs Lionais*, 27 L. C. J., p. 94. (Not reported in P. C. App.)

8. Where the defendants purchased the right from plaintiff to manufacture and sell a patented churn and, more than two months subsequently, wrote that the churn was a success, that they could not afterwards, in defence to an action on the contract, set up misrepresentation as to the merits of the patented article.—MACKAY, J.—*Campbell vs James*, 4 L. N., p. 210.

9. That when the vendor of a colt takes, in payment of the purchase money, the promissory note of a third party, unendorsed or otherwise guaranteed in writing by the purchaser, but which the purchaser, knowing the same to be worthless, represents to the vendor to be "*as good as gold*" and which proves to

Digitized by Google

be worthless, in consequence of the insolvency of the parties thereto, the vendor may tender the note back and sue simply for the purchase money, without demanding the rescision of the sale.—C. R.—*Miller vs Daudelin*, 24 L. C. J., p. 208.

10. Que l'acceptation d'une succession par un majeur n'est pas valable, si cette acceptation a été le résultat du dol, et que dans l'espèce il y a eu dol.—Q. B.—*Ayotte & Boucher*, 3 Q. B. R., p. 123, 8 Q. L. R., p. 327.—SUPREME COURT, 9 S. C. R., p. 460, C. D., p. 502.

11. The rescision, on the ground of fraud, of a deed transferring real estate, will not affect the rights of a third party who, in good faith, has lent money on the property whilst it was in the possession of the purchaser, when the vendor, by his own act or fault, has, to some extent, induced the third party to make the advance.—Q. B.—*Lighthall & Craig*, M. L. R., 1 Q. B., p. 275.—MATHIEU, J.—11 R. L., p. 402,—SUPREME COURT.—C. D., p. 8.

12. Que l'annulation d'une vente ou donation d'un immeuble pour cause de fraude, n'atteint pas l'hypothèque consenti à un tiers de bonne foi, lorsque l'emprunteur possède le dit immeuble en vertu de titres parfaits à leur face et n'indiquant aucun signe apparent de nullité.—Q. B.—*Normandin & Arnois*, 3 Q. B. R., p. 329.

13. Where the Appellant endorsed certain extension notes on condition that the debtor paid so much per week into a bank, as security for such endorsement, and where, the debtor subsequently becoming insolvent, the assignee to his estate sought to recover such moneys so pledged, it was held, that the contract so entered into was valid and that there was no fraud.—Q. B.—*Normand & Beausoleil*, 2 Q. B. R., p. 215. Confirmed by SUPREME COURT.—9 S. C. R., p. 711.

14. Que l'intimé qui a acheté une terre de son beau-frère à la charge de payer les dettes de celui-ci, l'a fait dans le but de venir en aide à Scott, et que cette transaction n'est nullement entachée du dol.—Q. B.—*Blouin & Brunelle*, 3 Q. B. R., p. 58.

15. Where the Appellant bought a certain stock in trade, amongst the alleged assets of which was a pretended patent for a process of wire-coiling, which patent had no existence in Canada, it was held, that there being deception and misrepresentation as regards the patent, the purchaser was entitled to damages.—Q. B.—*Tye & Fairman*. M. L. R., 1 Q. B., p. 504.

16. Where a person sold property to another and received, as consideration of such sale, shares of the Silver Plume Mining Company, which the buyer represented to be an incorporated company, and of the mercantile value quoted in the stock market, which statements were false, it was held that the seller could resiliate the sale.—Q. B.—*Chrétien & Crowley*, 2 Q. B. R., p. 385. 5 L. N., p. 268.—TORRANCE, J.—4 L. N., p. 171.

17. Que l'intimé qui a vendu à Chrétien une propriété pour la somme de $16,000, dont une partie payable aux créanciers hypothécaires et la balance à l'intimé, en un certain nombre d'actions dans la "Silver Plume Mining Company," au pair, lesquelles, bien que passant dans le public au moment de la vente pour valoir soixante et dix pour cent, ne valaient cependant rien, a droit d'être indemnisé pour la différence entre le montant des hypothèques grevant sa propriété et celui de sa valeur réelle, par les appellants, qui avaient fait coter à la Bourse de Montréal les actions de la compagnie d'une manière fictive et ont, par là, contri-

Digitized by Google

bué à tromper l'intimé sur la valeur réelle de ces actions.—Q. B.—*Dorion & Crowley*, 4 Q. B. R., p. 322, 30 L. C. J., p. 65.

18. Qu'un débiteur insolvable, qui fait un acte d'atermoiement avec la masse de ses créanciers et qui, pour obtenir la signature de l'un d'eux, lui fait un engagement particulier où il est mieux traité que les autres créanciers, n'est pas reçu à quereller cet engagement particulier.—MATHIEU, J.—*Chapleau vs Lemay*, 14 R. L., p. 198.

19. A simulated act of sale, made with the intention to defraud creditors, can be resiliated at the instance of a party to it, if the contemplated fraud is not wholly or in part the cause or consideration of the agreement between the parties.—Q. B.—*Dorion & Dorion*, 3 Q. B. R., p. 376.

20. Que lorsque le vendeur et les acheteurs dans un acte de vente sont poursuivis conjointement et solidairement pour faire déclarer que, par fraude et collusion, le dit acte a été simulé, le vendeur ne peut appeler, en garantie, les acheteurs, ses co-défendeurs, sur le principe qu'il n'a lui a commis aucune fraude; car, dans ce cas, l'action principale sera déboutée contre lui, et s'il y a eu fraude commune, le vendeur n'a aucun recours en garantie contre ceux qui auraient avec lui participé à la fraude.—TASCHEREAU, J.—*Benoit vs Bruneau*, M. L. R., 2 S. C. p. 82.

21. That the endorser of a composition note given by a debtor to his creditor, in carrying out a settlement for fifty cents in the dollar, was not liable for the amount of such note when it appeared that the debtor, for whom he endorsed the note, as surety, and from whom he had taken a transfer of his estate as collateral security, had secretly given the Plaintiff, (the creditor) his own notes for the balance of his claim, in order to obtain his assent to the composition, and the creditor had already received fifty cents on his claim.—Q. B.—*Arpin & Poulin*, 22 L. C. J., p. 331.

22. The endorser of composition notes is not discharged from liability thereon by the mere fact that the compounding creditors have secretly stipulated with the debtor that he shall pay them an amount in excess of the composition rate, as the condition of their assent to the composition; and especially when the endorser, as the consideration of his endorsement, obtained a transfer of the insolvent's entire stock-in-trade and assets which he still retained when sued on the composition notes. But the endorser is entitled to a deduction of all sums that the creditor has received in excess of the composition notes.—Q. B.—*Martin & Poulin*, 4 L. N. p. 20, 1 Q. B.R.p. 75.

23. The endorsers of composition notes for an insolvent, remain liable thereon, though the discharge of the insolvent may have been annulled by the Court and though the insolvent may have given other notes by way of preference to some of his creditors.—Q. B.—*Marchand & Wilkes*, 3 L. N., p. 318.

24. That a note given by an insolvent or by a third person to induce the payee to consent to the insolvent's discharge or to sign a deed of composition, is null and void, and where money is paid for the same purpose it may be recovered from the person receiving it. The fact that the maker of the note is the insolvent's father, does not constitute a valid consideration for such a note; for a benefit to another is a good consideration only where the benefit can be had lawfully.—JOHNSON, J.—*Leclaire vs Casgrain*, M. L. R., 3 S. C., p. 355.

25. When J. R, trustee to an insolvent estate, is a member of a firm holding insolvent's note given it in illegal preference, and where the purchasers of

Digitized by Google

the estate having appointed the insolvent their agent for the purpose of realizing its assets, the latter pays the proceeds to J. R., it was held, on suit brought by a trustee *ès-qualité* against purchasers for balance of price, that the moneys so paid will be imputed on account of the debt due trustee by purchasers and that the knowledge by J. R. of the illegal preference, which came to him as a member of the firm, is a knowledge by him in his capacity as trustee.—Q. B.—*Ross & Paul*, M. L. R., 3 Q. B., p. 299.

26. That a debtor against whose property a judgment has been registered and who afterwards makes an assignment and obtains back his estate by a composition with his creditors in which he undertakes to pay the hypothecs in full, cannot have the hypothecs so registered set aside at his own suit on the ground that it is a fraud on his creditors.—Q. B.—*Foster & Baylis*, M. L. R., 3 Q. B., p. 421.

27. Qu'un créancier peut saisir, par saisie-arrêt, une créance pour laquelle son débiteur est colloqué, quand même ce dernier se serait fait illégalement transporter cette créance, laquelle appartiendrait réellement à un tiers ; le recours de ce tiers est contre le débiteur.—MATHIEU, J.—*Senécal vs Exchange Bank*, M. L. R., 2 S. C., p. 108.

28. Where a simulated sale of real estate was made at an overvaluation and the seller took hypothecs for part of the price, and then transferred such hypothecs to a merchant in payment of goods purchased, it was held that the merchant, on proving the fraudulent nature of the sale, could ask for personal condemnation against the seller for the goods sold. (C. C. 1012.)—Q. B.—*Black & Walker*, M. L. R., 1 Q. B., p. 214, 8 L. N., p. 67.

29. That the circumstance that the purchaser was the daughter of the vendor and that she had no apparent means to purchase the property, and from her position, was not likely to have made savings to pay for it, were sufficient presumptions of fraud in the absence of any evidence to the contrary, to annul the sale.—Q. B.—*Paige & Evans*, 1 Q. B. R., p. 352.

30. Where an article sold by auction is falsely represented to be the property of a person to whom it did not belong and to have cost a sum far in excess of its actual worth, the sale is null and void, and an action cannot be maintained against the purchaser.—TORRANCE, J.—*Shaw vs Lacoste*, M.L.R., 2 S. C., p. 249.

31. Que l'achat à crédit par un insolvable, qui ne divulgue pas au vendeur l'état de ses affaires, n'est pas suffisant seul pour faire présumer l'intention de frauder, et que les espérances légitimes que pouvait avoir l'acheteur de refaire ses finances, et sa conduite, en payant une moitié des avances comptant et une moitié de la balance trois mois après, font obstacle à cette présomption.—C. R.—*Convey vs Renouf*, 5 Q. L. R., p. 224.

32. Henry Aylmer, Jr., having been authorized, by power of attorney, to sell property belonging to the respondent, sold the whole to the appellants in payment of his own debts. *Held:* That although he was authorized to sell the property, he could not do so to pay his own debts, and that the sale to the appellants was properly set aside.—Q. B.—*Maher & Aylmer*, 1 Q. B. R., p. 106.

33. See also case noted at C. C. 1035.—SUPREME COURT.—*Rickaby & Bell*, C. D., p. 187.

Digitized by Google

§ 3. *Of violence and fear.*

994. Violence or fear is a cause of nullity whether practised or produced by the party for whose benefit the contract is made or by any other person.—Domat, liv. 4, tit. 6, sec. 3, n. 1; *ff* L. 1, 2, 3, 21, § 5, *Quod metûs causâ*; L. 116, *in principio*; *De reg. jur.*; Domat, liv. 1, tit. 1, sec. 5, n. 10; Pothier, *Oblig.*, 21, 22, 23; C. N., 1109, 1111. [I. 41.]

DECISIONS:—1. An action *condictio indebiti* lies to recover back money which has been paid, but under protest in satisfaction of a prescribed debt, when illegal coercion has been employed to obtain the payment.—Q. B.—*Corporation of Quebec vs Caron*, 10 L. C. J., p. 317.

2. A signature to a note having been obtained from an old woman, by threats that if she did not sign her son would be arrested for stealing money, an action *en garantie* will lie against the person who used threats and extorted the note, to protect the signer from a judgment obtained by a third innocent *bona fide* holder. A son having acknowledged to have stolen $25 from M., the latter, by threatening to have the son arrested, induced the mother and son to sign a note in his favor for $400. *Held*:—The note under the circumstances being signed by the mother under the influence of fear for her son, that there was violence and no consent or legal consideration, and the mother could not be held liable. — Q. B. — *Macfarlane & Dewey*, 15 L. C. J., p. 85.

3. An obligation extorted by violence is null and payments made to and received by the party seeking for the nullity of an obligation on such grounds do not constitute an acquiescence.—Buchanan, J.—*Dugrenier vs Dugrenier*, 6 L. N., p. 234.

4. Plaintiff found a pocket-book containing $850 belonging to the Defendant. Four days afterwards she restored it to the Defendant, receiving a reward of $200. Subsequently, the defendant took criminal proceedings against her, whereupon she returned the reward which she had received, but afterwards sued the defendant to return the reward. Her action was dismissed, it being held that there was no *duress*.—Supreme Judicial Court, Boston.—*Felton vs Gregory*. 4 L. N., p. 113.

995. The fear whether produced by violence or otherwise must be a reasonable and present fear of serious injury. The age, sex, character and condition of the party are to be taken into consideration.—*ff* L. 5, *Quod metûs causâ*; L. 6, L. 9, *metus non vani hominis*; *ff* L. 184, *De reg. jur.*; Pothier, *Oblig.*, 25; 4 Marcadé, n. 411; C. N., 1112. [I. 41.]

996. Fear suffered by a contracting party is a cause of nullity whether it is a fear of injury to himself, or to his wife, children or other near kindred, and sometimes when it is a fear of injury to strangers, according to the circumstances of the case.—*ff* L. 8, § 3;

Digitized by Google

Quod metûs causâ; Pothier, *Oblig.*, 25; 4 Marcadé, n. 413; 10 Duranton, n. 152; C. N., 1113. [I. 41.]

997. Mere reverential fear of a father or mother, or other ascendant, without any violence having been exercised or threats made, will not invalidate a contract.—Pothier, *Oblig.*, 27; C. N., 1114. [I. 41.]

998. If the violence be only a legal constraint, or the fear only of a party doing that which he has a right to do, it is not a ground of nullity; but it is, if the forms of law be used or threatened for an unjust and illegal cause to extort a consent.—Pothier, *Oblig.*, 26; *ff* L. 3, § 1, *Quod metûs causâ*; C. L., 1850, 1851. [I. 41.]

999. A contract for the purpose of delivering the party making it, or the husband, wife or near kinsman of such party from violence or threatened injury, is not invalidated by reason of such violence or threats; provided the person in whose favor it is made be in good faith, and not in collusion with the offending party. — *ff* L. 9, § 1, *Quod metûs causâ*; Pothier, *Oblig.*, 24; C. L., 1852; 4 Marcadé n. 415. [I. 43.]

1000. Error, fraud, and violence or fear are not causes of absolute nullity in contracts. They only give a right of action, or exception, to annul or rescind them.—Pothier, *Oblig.*, 29, Authorities under C. C., 993; C. N., 1117. [I. 43.]

DECISION:—Des souscriptions à un fonds social ou stock obtenues par surprise, fraude et par de faux états des affaires de la compagnie faits par ses officiers et ses directeurs, sont nulles et ne produisent aucune obligation. Les actionnaires ainsi trompés peuvent même recouvrer ce qu'ils ont payé en acompte de leurs parts—C. R.—*Glen Brick Co. vs Shackwell*, 1 R. C., p. 121.

§ 4. *Of lesion.*

1001. Lesion is a cause of nullity only in certain cases and with respect to certain persons, as explained in this section.—C. N., 1118. [I. 43.]

DECISION:—L'acheteur ne possede point l'action rescisoire pour faire rescinder le contrat de vente pour cause de lésion d'outre-moitié du juste prix.—Q. B.—*Chapleau & Debien*, 13 L. C. J., p. 194.

1002. Simple lesion is a cause of nullity in favor of an unemancipated minor against every kind of act when not aided by his tutor, and when so aided, against every kind of act other than

Digitized by Google

acts of administration; and in favor of an emancipated minor against all contracts which exceed his legal capacity, as established in the title *Of Minority, Tutorship, and Emancipation;* subject to the exceptions specially expressed in this code.—Pothier, *Oblig.*, 40; Domat, liv. 4, tit. 6, sec. 2, nn. 19, 23, 24, *Id.*, liv. 2, tit. 1, sec. 3, n. 16; Cod., L. 2, *Si tut. vel. cur. interv.*, *ff* L. 7, §§ 3, 5, 7, L. 29. L. 34, § 1; L. 49, *De minoribus*; Meslé, *Des minorités*, c. 14, n. 27; C. N., 1305. [I. 43.]

DECISIONS:—1. Pour se faire relever d'un acte passé durant la minorité, il ne suffit pas d'alléguer lésion; mais il faut la prouver.—Q. B.—***Métrisse & Brault***, 4 L. C. J., p. 60.

2. La preuve de la lésion, pour le mineur, peut être déduite, sans être positivement prouvée.—Le fait que le mineur aurait géré une partie considérable de ses affaires, pendant sa minorité, n'est pas une excuse pour repousser la rescision.—Les fruits et revenus sont dus au mineur depuis la date de la transaction attaquée par voie de rescision, si le défendeur ne prouve pas autrement sa bonne foi que par le fait que ce mineur avait fait des affaires durant sa minorité.—Le mineur obtenant rescision, n'est tenu de rembourser que les impenses *nécessaires*.—Monk, J.—*Larivière vs Arsenault*, 5 L. C. J., p. 220.

3. C'est au demandeur qui veut recouvrer de l'argent prêté à un mineur à prouver l'emploi utile de l'argent.—Taschereau, J.—*Miller vs Demeule*, 18 L. C. J. p. 12.

4. Il ne suffit pas de plaider minorité à une action sur billet promissoire consenti par un mineur, mais il faut aussi plaider lésion.—Doherty, J.—*Boucher vs Girard*, 20 L. C. J., p. 134.

5. A plea alleging minority, without lesion, is bad.—Meredith, J.—*Bluteau vs Gauthier*, 1 Q. L. R., p. 187.

6. The incapacity of a minor, being established in his own favor, and not against him, the result of this incapacity is not that he cannot contract, but only that he cannot be injured by his contract, and he, therefore, cannot be relieved from his contract by merely pleading his minority, but he must also plead and prove that he has been injured by the contract.—C. R.—*Gagnon vs Sylva dit Portugais*, 24 L. C. J., p. 251.

7. Que tout acte d'un mineur est frappé de nullité s'il y a lésion, et que la lésion la plus grande est celle qui entraîne la perte de la liberté.—Caron, J.—*Morgan vs LeBoutillier*, 5 Q. L. R., p. 212.

1003. The simple declaration made by a minor that he is of the age of majority forms no bar to his obtaining relief for cause of lesion.—Domat, liv. 4, tit. 6, sec, 2, n. 7; Meslé, c. 14, n. 55, pp. 410, 411; Cod., L, 1, *Si minor se majorem dixerit*; C. N., 1307. [I. 43.]

1004. A minor is not relievable for cause of lesion, when it results only from a casual and unforeseen event.—*ff* L. 11, § 4, *De minoribus*; Meslé, p. 391 et p. 14, n. 18; Domat, liv. 4, tit. 6, sec. 2, n. 15; C. N., 1306. [I. 43.]

Digitized by Google

1005. A minor who is a banker, trader or mechanic is not relievable for cause of lesion from contracts made for the purposes of his business or trade.—Meslé, p. 14, n. 53; Rép. jurisp. vo. *Mineurs*, p. 528; Ord. de 1673, tit. 1, art. 6; C. N., 1308. [I. 43.]

1006. [A minor is not relievable from the stipulations contained in his marriage contract, when they have been made with the consent and assistance of those whose consent is required for the validity of his marriage.]—Meslé, c. 14, n. 42; 7 Toullier, n. 584; C. N., 1309. [I. 45.]

1007. A minor is not relievable from obligations resulting from his offences and quasi-offences.—*ff* L. 37, § *prel*; *ff* L. 9, *De minoribus*; Cod., L. 1, *Si adversus delictum*; Meslé, 14. n. 54; Domat, liv. 4, tit. 6, sec. 2, nn. 5, 6; C. N., 1310. [I. 45.]

1008. A person is not relievable from a contract made by him during minority, when he has ratified it since attaining the age of majority. — Meslé, p. 14, n. 56; Roman law and *arrêts* cited by him; Domat, liv. 4, tit. 6, s. 2, nn. 31, 32; C. N., 1311. [I. 45.]

DECISION:—No action is maintainable against a person for a promise made to pay a commercial debt contracted while a minor, unless such promise be in writing—BERTHELOT, J.—*Mann vs Wilson*, 3 L. C. J., p. 337.

1009. Contracts by minors for the alienation or incumbrance of their immoveable property made with or without the intervention of their tutors or curators, unattended with the formalities required by law, may be avoided without proof of lesion.—Cod. L. 11, *de prædiis et aliis rebus*; Pothier, *Vente*, nn. 14, 168, 516; Domat, liv. 4, tit. 6, sec. 2, n. 26. [I. 45.]

DECISIONS:—1 Toute aliénation et hypothèque des biens immobiliers d'un mineur, non précédée d'une autorisation judiciaire obtenue suivant les formalités ordinaires, est nulle de nullité radicale qui peut être demandée par tous tiers intéressés.—LORANGER, J.—*Béliveau & Barthe*, 7 R. L., p. 453.

2. A mortgage given by a minor is not radically null, but is merely subject to be annulled in case of *lésion*.—C. R.—*Béliveau & Duchesneau*, 22 L. C. J., p. 37.

1010. [When all the formalities required with respect to minors or interdicted persons for the alienation of immoveable property, or the partition of a succession, have been observed, such contracts, and acts have the same force and effect as if they had been executed by

Digitized by Google

persons of the age of majority and free from interdiction.]—Cod., L. 2, *si tutor. vel curat. inter ; ff* L. 29, *de minor*, L. 7, § 3, *pro empt.*; Domat, liv. 2, tit. 1, s. 2, n. 10; *Id.*, liv. 4, tit. 6, s. 2, nn. 23, 24; Meslé, c. 14; 2 Henrys, 257, nn. 1, 2; C. N., 1314; C. L., 1862; 4 Marcadé, on art., 1314. [I. 45.]

1011. When minors, interdicted persons or married women are admitted in these qualities to be relieved from their contracts, the reimbursement of that which has been paid in consequence of these contracts, during the minority, interdiction or marriage, cannot be exacted, unless it is proved that what has been so paid has turned to their profit.—Meslé, p. 14, n. 25, and arrêts cited by him; 7 Toullier, n. 580; C. N., 1312. [I. 45.]

DECISION:—L'indemnité due au mineur, pour lésion, ne souffre pas réduction du montant qu'il a reçu et il n'est pas obligé de rembourser ce qu'il a reçu, à moins qu'il ne soit plaidé et prouvé que ce qu'il a reçu lui a profité.—MONK, J.—*Larivière vs Arsenault*, 5 L. C. J., p. 220.

1012. [Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only.]—C. N., 1313. [I.47.]

DECISIONS:—1. A deed of sale cannot be rescinded on the ground of *lésion*, where the amount of the consideration, and the actual value of the property at the time of the execution of the deed, are not fully established.—MONK J.—*Lemoine vs Lionais*, 2 L. C. L. J., p. 163.

2. Dans la vente, la valeur de l'objet vendu n'est qu'une qualité accidentelle du sujet de la vente.—Q. B.—*Rosenheim & Martin*, 6 R. L., p. 258.

3. Real estate, estimated to be worth $1,200, was sold to a person without means, for a consideration, stated in the deed to be $3,650. No money was paid, and the vendors remained in possession. The vendee executed a deed of obligation and hypothec in favor of the vendors for the unpaid instalments. Two of these instalments, amounting to $2,000, were subsequently transferred by the vendors to W. in payment of goods purchased.—*Held*:—That the sale of the property, and the obligation and hypothec in favor of the vendors, being simulated and fraudulent, W. was entitled to have the deed of obligation and hypothec from the vendee to the vendors set aside, as regards him (the vendee being a party to the suit), and to ask that the vendors be condemned to pay for the goods as his personal debtors.—Q. B.—*Black & Walker*, M. L. R., 1 Q. B., p. 214, 8 L. N., p. 67.

SECTION III.—OF THE INTERPRETATION OF CONTRACTS.

1013. When the meaning of the parties in a contract is doubtful, their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of

Digitized by Google

the contract.— *ff* L. 219, *De verb. signif.* ; Pothier, *Oblig.*, 91 ; Domat, liv. 1, tit. 1, sec. 9, n. 8 ; C. N., 1156. [I. 47.]

DECISION :—Que toute ambiguité ou incertitude sur le sens ou la portée d'un document signé par deux parties, mais rédigé par l'une d'elles en l'absence de l'autre, et sans aucune participation de sa part, doit être interprétée contre celle qui l'a écrit ou dicté.—Q. B.—*Rooney & Fair*, 10 R. L., p. 103.

1014. When a clause is susceptible of two meanings, it must be understood in that in which it may have some effect rather than in that in which it can produce none.—*ff* L. 80, *De verb. oblig.*; Pothier, 92 ; C. L., 1946 ; C. N., 1157. [I. 47.]

1015. Expressions susceptible of two meanings must be taken in the sense which agrees best with the matter of the contract.—*ff* L. 67, *De reg. jur.*; Pothier, 93 ; C. L., 1947 ; C. N., 1158. [I. 47.]

1016. Whatever is doubtful must be determined according to the usage of the country where the contract is made.—*ff* L. 34, *De reg. jur.*; Pothier, 94 ; Domat, liv. 1, tit. 1, sec. 2, n. 9 ; C. L., 1948 ; C. N. 1159. [I. 47.]

1017. The customary clauses must be supplied in contracts, although they be not expressed.—*ff* L. 31, § 20, *De ædilitio edicto* ; Pothier, 95 ; C. L., 1949 ; C. N., 1160. [1. 47.]

1018. All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act.—*ff* L. 24, *De legibus ;* L. 126, *De verb. signif ;* Pothier, 96 ; Domat, liv. 1, tit. 1, sec. 2, n. 10 ; C. L., 1950 ; C. N., 1161. [I. 49.]

DECISIONS :—1. Where two clauses in a deed conflict, the one being in writing and the other printed, the written clause should have effect given to it as being more likely to contain the real intention of the parties.—Q. B.—*Desrosiers & Lamb*, M. L. R., 4 Q. B., p. 45.

2. A charter party described a voyage, in the written part thereof, as being from Havana, Cuba, "*to Montreal direct viâ the river St Lawrence.*" A printed clause therein declared that the steamer should "have liberty to tow and be "towed and to assist vessels in all situations, *also to call at any port or ports for* "*coals or other supplies.*" *Held*:—That the fact that the steamer called at the port of Sydney, C. B., for coal, in the course of the voyage, was not a deviation therefrom other than permitted by the charter party.—Q. B.—*Peters & Canada Sugar Refining Co.*, M. L. R., 2 Q. B., p. 420.

3. Que la partie qui s'engage à faire un certain nombre de choses pour un prix de tant chaque, ne s'engage pas par là à en faire un nombre moindre au même prix.—CARON, J.—*Battis vs Anderson*, 14 Q. L. R., p. 181.

Digitized by Google

1019. In cases of doubt, the contract is interpreted against him who has stipulated and in favor of him who has contracted the obligation.—*ff* L. 38, § 18, *De verb. oblig.*, L. 99, L. 26, *De rebus dubiis;* Pothier, 97; Domat, liv. 1, tit. 1, sec. 2, n. 13; C. L., 1952; C. N., 1162. [I. 49.]

1020. However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract.—*ff* L. 3, § 2, L. 5, L. 9, § 3, L. 12, *De transactionibus*; Pothier, 98, 99; Domat, liv. 1, tit. 1, sec. 2, n. 21; C. L., 1954; C. N., 1163. [I. 49.]

1021. When the parties in order to avoid a doubt whether a particular case comes within the scope of a contract, have made special provision for such case, the general terms of the contract are not on this account restricted to the single case specified.—*ff* L. 81, *De reg. jur.*, L. 56, *Mand vel contrà;* Pothier, 100; C. L., 1957; C. N., 1164. [I. 49.]

SECTION IV.—OF THE EFFECT OF CONTRACTS.

1022. Contracts produce obligations, and sometimes have the effect of discharging or modifying other contracts.

They have also the effect in some cases of transferring the right of property.

They can be set aside only by the mutual consent of the parties or for causes established by law.—Pothier, *Oblig.*, 85; *ff* liv. 1, tit. 1, s. 3, n. 12, s. 2, n. 7; C. N., 1134. [I. 49.]

DECISION:—Que l'acquéreur d'immeubie qui s'oblige par son acte d'acquisition de payer à un vendeur précédent une balance de prix d'une vente antérieure, s'oblige par là même à payer au cessionnaire de ce vendeur, quoique le transport de la créance ait eu lieu avant cette délégation.—C. R.—*Scott vs McCaffrey*, 16 R. L., p. 200.

1023. Contracts have effect only between the contracting parties; they cannot affect third persons, except in the cases provided in the articles of the fifth section of this chapter.—*ff De pactis*, L. 27, § 4; Pothier, *Oblig.*, 85, 87, 88, 89; C. N., 1165. [I. 49.]

1024. The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature.—

Digitized by Google

ff L. 2, § 3, *De oblig. et action*, L. 35, *De reg. jur.*; Cod., lib. 4, tit. 10, 4, *De oblig. et action*; Domat. *loc. cit.*; C. N., 1135. [I. 49.]

1025. [A contract for the alienation of a thing certain and determinate makes the purchaser owner of the thing by the consent alone of the parties, although no delivery be made.

The foregoing rule is subject to the special provisions contained in this code concerning the transfer and registry of vessels.

The safe-keeping and risk of the thing before delivery are subject to the general rules contained in the chapters *Of the effect of obligations* and *Of the extinction of obligations* in this title.]—*ff* L. 35, § 5, *De contrahendâ emptione*; Pothier, *Vente*, 308, 309; 6 Toullier, nn. 202, 204; 7 Toullier, nn. 34, 231, 460; *Cout. d'Orl.*, art. 278; C. L., 1903; C. N., 1583. [I. 51, III 381.]

DECISIONS:—1. Des matériaux pour bâtir, délivrés dans une rue en face de la bâtisse pour laquelle ils sont destinés, et qui ont été payés par le propriétaire de la bâtisse, deviennent sa propriété absolue, sans être actuellement incorporés dans la bâtisse.—C. R.—*McGauvran vs Johnson*, 4 R. L., p. 680.

2. When a person who sells goods on time shows by his acts his purpose to retain the property therein until the conditions of sale be complied with, as, for example, by consigning the goods to his own agent in the city where the purchaser resides, with instructions not to part with the bill of lading until the purchaser shall have accepted a draft for the price, the right of property does not pass to the purchaser and the agent of the vendor may reclaim the goods in the event of the purchaser refusing to accept a draft for the price payable at the expiration of the term of credit.—Q. B.—*MacGillivray & Watt*, 31 L. C. J., p. 278, M. L. R., 3 Q. B., p. 249.—C. R.—M. L. R., 3 S. C., p. 170, 31 L. C. J., p. 49.

1026. If the thing to be delivered be uncertain or indeterminate, the creditor does not become the owner of it until it is made certain and determinate, and he has been legally notified that it is so.—Pothier, *Vente*, 309, 310; 7 Toullier, n. 460; 6 Toullier, n. 202, note; C. L., 1903. [I. 51.]

DECISION:—Que l'acquéreur d'un objet indéterminé, dans l'espèce, 78 cordes de bois, ne peut prendre une saisie revendication, pour revendiquer cet objet, avant qu'il soit déterminé.—MATHIEU, J.—*Contant vs Normandin*, 11 R. L., p. 479.

1027. [The rules contained in the two last preceding articles, apply as well to third persons as to the contracting parties, subject, in contracts for the transfer of immoveable property, to the special provisions contained in this code for the registration of titles to and claims upon such property.

But if a party oblige himself successively to two persons to deliver to each of them a thing which is purely moveable property,

Digitized by Google

that one of the two who has been put in actual possession is preferred and remains owner of the thing although his title be posterior in date ; provided, however, that his posession be in good faith.]—Cod., L. 15, *De rei vindicatione ;* Quoties, etc.; Pothier, *Oblig.*, 151, 152, *Vente* 318, 319 ; 6 Toullier, nn.204, 205 ; C. L. 1914, 1916 ; C.N., 1141. [I. 51.]

Note.—The Act intituled " An Act respecting the Civil Code of Lower Canada," 29 Vict. cap. 41, at paragraph 5 of the schedule thereto, varies from the above as to the position of the word " subject " in the first clause of the above article. The Act makes the word " subject " follow the words " immoveable property " instead of preceding the words " in contracts," as in the official copy of the code above given. Chief Justice Dorion in the case of Dupuy & Cushing (22 L. C. J. p. 201) discusses this variation and held that the official copy of the code prevailed. The decision in the case was maintained in the Privy Council. See C. C. 1472.

DECISIONS :—1. The plaintiff in a petitory action cannot obtain a judgment in his favor upon a deed of sale to him dated subsequently to the defendant's occupation of the land in dispute, the plaintiff's *auteur* not having been in possession of the land at or previous to the date of such deed.—Q. B.—*Gibson & Weare*, 12 L. C. R., p. 98.

2. Similar division.—Q. B.—*Foisy & Demers*, 12 L. C. R., p. 210.

3. Where a party sells a moveable to two different persons, the one of the two who has been put in actual possession is preferred, and remains owner of the thing, although his title be posterior in date, provided he be in good faith.—Mackay, J.—*Maguire vs Dackus*, 15 L. C. J., 20.

4. In the case of the sale of a moveable to two different persons, the purchaser who has obtained actual possession and is in good faith shall be preferred, as respects the ownership of the moveable, althought his title be posterior to that of the other purchaser.—C. R.—*Staniforth vs McNeely*, 22 L. C. J., p. 50.

5. When a party has obliged himself successively to two persons to deliver to each of them a moveable article, that one of the two who, in good faith on his part, has been put in actual possession, is preferred and remains owner of the thing, although the purchase by the other was anterior in date.—C. R.—*Dupuis vs Racine*, 1 L. N., p. 486.

6. See case noted at C. C., 1472 and 1970.—Privy Council.—*Cushing & Dupuis*, 5 App. Cas., p. 409.

7. The title of the possessor in the case being a posterior title is worthless, being contaminated by fraud.—Johnson, J.—*Quintal vs Mondor*, 3 L. N., p. 166.

SECTION V.— OF THE EFFECT OF CONTRACTS WITH REGARD TO THIRD PERSONS.

1028. A person cannot, by a contract in his own name, bind any one but himself and his heirs and legal representatives ; but he may contract in his own name that another shall perform an obli-

Digitized by Google

gation, and in this case he is liable in damages if such obligation be not performed by the person indicated.—Instit., lib. 3, tit. 19, §§ 19, 20; *ff* L. 73, § 4, *De reg. jur.*; *ff* L. 81, *De verb. oblig.*, L. 38, § 2; Pothier, 53, 56; C. N., 1119, 1120. [I. 51.]

DECISION:—B., cessionnaire de partie du droit d'exploiter une patente dans la Province de Québec, fait avec L. ce contrat:—" L. désireux de s'associer à cette " exploitation, paye à B. la somme de $1,000, comptant, à condition de partager " également, &c.—Ce dernier, B., s'engage à se rendre à Québec, et à consacrer son " temps, son travail et son énergie à mettre son projet à l'exécution, et se fait fort de " mettre en marche la compagnie projetée avant le 15 novembre prochain."—JUGÉ:—Que, dans le cas où B. n'a pu remplir ses engagements, et mettre en marche la dite compagnie pour l'exploitation de la patente en question, avant le délai fixé, ce contrat ne peut être considéré comme un acte de société, et L. a le droit de résilier le dit contrat et de faire condamner B. à lui remettre les $1,000 par lui payées.—C. R.—*Laviolette vs Bossé*, M. L. R., 1 S. C., p. 429.

1029. A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself or of a gift which he makes to another; and he who makes the stipulation cannot revoke t, if the third person have signified his assent to it.—*ff* L. 38, §§ 20, 21, 23, *De verb. oblig.*; Pothier, 70, 73; C. N., 1121. [I. 51 to 53.]

DECISIONS:—1. One in whose favor a stipulation is made by another may bring an action to enforce it, though not a party to the contract.—TORRANCE, J.—*Brisbin vs Campeau*, 21 L. C. J., p. 16.

2. La stipulation faite au profit d'un tiers dans un acte de donation, peut être révoquée par le stipulant, même sans le consentement du donataire, s'il n'a pas d'intérêt à l'accomplissement de la stipulation, tant que celui au profit duquel la libéralité est faite, n'a pas manifesté l'intention de l'accepter.—C. R.—*Grenier vs Leroux*, 22 L. C. J., p. 68.

3. Judge Ramsay *loq.* " I am not aware that there is any substantial distinction between the delegation of a new debtor and the *indication de paiement*, as used in C. C. 1174. Neither creates novation and both are within C. C. 1029, that is, they both require acceptance.—Q. B.—*Société Permanente de Construction & Robinson*, 1 Q. B. R., p. 36, 4 L. N., p. 39.

4. Que l'acceptation d'une donation, sur la charge imposée au donataire de donner quelque chose à un tiers, rend parfaite la donation sans l'intervention de ce tiers, qui acquiert ainsi le droit d'exiger, en son temps, l'accomplissement de cette charge stipulée à son profit. (C. C. 791.)—Q. B.—*Paré & Paré*, 3 Q. B. R., p. 359.

5. Que l'indication de paiement à quelqu'un qui n'est pas créancier du stipulant et dans l'intérêt de ce dernier, ne l'empêche pas de retirer la somme due et d'en donner quittance valable, quoique l'indication ait été antérieurement acceptée par un *negotiorum gestor* pour l'indiqué.—C. R.—*Lajoie vs Desaulniers*, 7 Q. L. R., p. 272.

And held in the Court of Queen's Bench.

Digitized by Google

6. Qu'une délégation de paiement, dans un acte de vente, n'ôte pas au vendeur le droit de recevoir le prix de sa propriété et d'en donner quittance à l'acquéreur, tant qu'elle n'est pas acceptée par le tiers, en faveur de qui elle est faite, ou par une personne dûment autorisée à le faire pour lui.—Q. B.—*Gérin Lajoie & Desaulniers*, 2 Q. B. R., p. 241.

7. Que dans une action pour résiliation d'un acte de vente, pour fraude, dans lequel le vendeur aurait chargé l'acquéreur de payer à un tiers une somme y mentionnée, sans qu'il apparaisse par la déclaration, que l'indication du paiement de la somme ait été acceptée par le tiers, il n'est pas nécessaire de mettre en cause ce tiers indiqué.—MATHIEU, J.—*Ethier vs Paquette*, 12 R. L., p. 184.

8. Que l'acceptation de l'indication de paiement peut être tacite, c'est-à-dire, s'exprimer par des faits aussi bien que par des paroles.—Que lorsque le stipulant est l'administrateur des biens et de la personne de l'indiqué, en stipulant, il déclare tacitement sa volonté d'accepter, et fait aussi l'indication irrévocable en faveur de celui qu'il représente et pour lequel il stipule.—C. R.—*Dostaler vs Dupont*, 8 Q. L. R., p. 365.

9. By an arbitration bond A. agreed to pay the sub-contractors of P., who was the sub-contractor of A., for the construction of a railway. R., one of P.'s sub-contractors, brought action against P. and A. claiming the benefit of the stipulation made in and by the bond. A. pleaded *inter alia*, that the arbitration was not carried out, no award made and that the submission became inoperative. (C. C. P., 1348.) HELD :—That the arbitration having fallen through, the submission became inoperative and the stipulation in favour of R., the third party, was revoked.—C. R.—*Read vs Perrault*, M. L. R., 3 S. C., p. 99.

8. See case noted in full at C. C., 993.—JOHNSON, J.—*Leclaire vs Casgrain*, M. L. R., 3 S. C., p. 355.

9. See cases noted at C. C., 1173.

1030. A person is deemed to have stipulated for himself, his heirs and legal representatives, unless the contrary is expressed, or result from the nature of the contract. —*ff* L. 143, *De regul. jur.*; *ff* L. 56, § 1, L. 38, § 14, *De verb. oblig.*; Pothier, 63, 70; C. N., 1122. [I. 53.]

1031. Creditors may exercise the rights and actions of their debtor, when to their prejudice he refuses or neglects to do so; with the exception of those rights which are exclusively attached to the person.—*ff* L. 134, *De reg. jur.*; L. 6, *Quæ in fraudem;* Lebrun, *Successions*, liv. 2, c. 2, s. 2, nn. 42, 43, p. 214; 6 Toullier, nn. 369, 370; Domat, liv. 2, tit. 10; Introd., s. 1, n. 8; C. N., 1166. [I. 53.]

DECISIONS :—The personal creditor of the owner of an immoveable, which has been sold by the sheriff in execution of a judgment of such creditor, can exercise such owner's rights for improvements on such property against the *bailleur de fonds* (C. C., 2072).—Q. B.—*Compagnie de Prêt et de Crédit Foncier & St-Germain*, 26 L. C. J., p. 39, 1 Q. B. R., p. 192.

2. Que le créancier peut exercer la faculté de réméré au lieu et place de son débiteur, et que s'il intervient un jugement entre ce dernier et l'acquéreur d'un

Digitized by Google

immeuble accordant le réméré et fixant le montant payable à l'acquéreur pour obtenir la rétrocession, le créancier bénéficie de tel jugement peut exercer les droits et se prévaloir des avantages qu'il assure à son débiteur et les opposer à l'acquéreur.—Q. B.—*Bouchard & Lajoie*, M. L. R., 2 Q. B., p. 450.

3. A creditor of an insolvent debtor has a right to sue a third party, asking that he be held to render an account of moneys which such creditor alleges the said third party to have collected on account of his debtor.—DOHERTY, J.—*Thompson vs Molson's Bank*, 8 L. N., p. 363.

4. Qu'un créancier a intérêt à contester le chiffre de la réclamation d'un autre créancier de son débiteur, et qu'il peut s'opposer par la voie de la tierce-opposition à un jugement rendu contre son débiteur, par collusion entre lui et cet autre créancier.—C. R.—*Greenshields & Plamondon*, 16 R. L., p. 322.

See also cases noted at C. C., 1032.

SECTION VI.—OF THE AVOIDANCE OF CONTRACTS AND PAYMENTS MADE IN FRAUD OF CREDITORS.

1032. Creditors may in their own name impeach the acts of their debtors in fraud of their rights, according to the rules provided in this section.— *ff* L. 1, §§ 1, 2, *Quæ in fraudem credit;* Nouv. Den., vo. *Fraude, relativement aux créanciers*, § 2, n. 2; 6 Toullier, nn. 343 et seq., 354, 366; Ord. du Com., 1673, tit. 11, art. 4; Règlement de Lyon de 1667; Déclaration de 1702; 2 Conférences de Bornier, p. 698; Edit de Henri IV, 1609; C. N., 1167. [I. 53.]

DECISIONS:—1. When parties have entered into an agreement with a view to defraud third persons, the agreement will nevertheless be valid and binding as between the parties thereto.—PRIVY COUNCIL.—*Shaw & Jeffrey*, 10 L. C. R. p. 340. 13 Moore's P. C. Rep., p. 432.

2. The nullity of a sale in fraud of creditors may be invoked and pleaded by any creditor who was not a party to such fraudulent contract, in any proceeding in which the sale is set up against him by a fraudulent holder of the property sold, *e. g.*, a garnishee.—Q. B.—*Kane & Racine*, 24 L. C. J., p. 216.

3. An assignee under a voluntary deed of assignment for the benefit of creditors, parties to the deed, is not entitled to plead in his own name in reference to such property. He only represents the assignor and can exercise solely the assignor's rights and not those pertaining to the creditors alone.—SUPREME COURT.—*Burland & Moffat*, 8 L. N. p. 147, 11 S. C. R., p. 76.—Q. B.—28 L. C. J., p. 214.

The above case and that of Brown & Pinsonneault reported at 3 S. C. R., p. 102 were over ruled in the Privy Council by the following decision.

4. Article 19 C. C. P. is applicable to mere agents or mandataries. It is not applicable to trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties and who have duties to perform in the protection or realization of the trust estate. Where trustees sold property over which they had possession and title, it was held that they were entitled to sue the purchaser to whom they had delivered possession upon his

Digitized by Google

covenant to pay the balance of the purchase money.—PRIVY COUNCIL—*Porteous & Reynar*, 13 App., Cas. p. 120, 11 L. N. p. 9.

5. Qu'un curateur à une succession vacante ne représente que la succession et le défunt et qu'il ne peut demander la nullité d'un acte fait par le défunt en fraude de ses créanciers, parce que, le débiteur décédé, lui-même ne peut demander la nullité d'un pareil acte. C'est lui qui a commis la fraude et il ne peut s'en prévaloir pour faire mettre de côté un acte qu'il a volontairement consenti.—Q. B.—*Lamarche & Pauzé*, 3 Q. B. R., p. 265.

6. A simulated act of sale, made with the intention to defraud creditors, can be resiliated at the instance of a party to it, if the said fraud is not altogether or in part the cause or consideration of the agreement between the parties.—Q. B.—*Dorion & Dorion*, 3 Q. B. R., p. 376.

7. Que lorsque le vendeur et les acheteurs dans un acte de vente, sont poursuivis conjointement et solidairement pour faire déclarer que, par fraude et collusion, le dit acte a été simulé, le vendeur ne peut appeler en garantie les acheteurs, ses co-défendeurs, sur le principe qu'il n'a, lui, commis aucune fraude, car, dans ce cas, l'action principale sera déboutée contre lui, et s'il y a eu fraude commune, le vendeur n'a aucun recours en garantie contre ceux qui auraient avec lui participé à la fraude.—TASCHEREAU, J.—*Benoit vs Bruneau*, M. L. R., 2 S. C., p. 82.

8. Que si l'adjudicataire d'effets vendus à une vente judiciaire, les laisse entre les mains du défendeur, sans qu'il y ait fraude, il, (le dit adjudicataire,) pourra cependant ensuite empêcher la vente des mêmes effets, à la poursuite d'un autre créancier du défendeur.—MATHIEU, J.—*Massie vs Rhéaume*, 11 R. L., p. 471.

9. Similar decision.—Q. B.—*Senécal & Crawford*, 5 L. N., p. 256., 2 Q. B. R., p. 121.

10. Que l'annulation d'un contrat à la poursuite des créanciers en vertu de l'article 1032 C. C., est sans effet vis à-vis des tiers de bonne foi.—Q. B.—*Normandin & Normandin*, 3 Q. B. R., p. 329.—C. R.—11 R. L., p. 596.

11. The rescission on the ground of fraud of a deed transfering real estate, will not affect the rights of a third party who, in good faith, has lent money on the property whilst it was in the possession of the purchaser, when the vendor, by his own act or fault, has, to some extent, induced the third party to make the advance.—Q. B.—*Lighthall & Craig*, M. L. R., 1 Q. B., p. 275.

12. Que les créanciers peuvent, dans une instance où on leur oppose un acte en fraude de leurs droits, l'attaquer, sans qu'il soit nécessaire de prendre une action spéciale à cet effet.—CHAGNON, J.—*Gillies vs Kirwan*, 12 R. L., p. 1.

13. The endorsers of composition notes for an insolvent remain liable thereon, though the discharge of the insolvent may have been annulled by the court and though the insolvent may have given other notes by way of preference to some of his creditors.—Q. B.—*Marchand & Wilkes*, 3 L. N., p. 318

14. That the endorser of a composition note given by a debtor to his creditor in carrying out a settlement for fifty cents in the dollar, was not liable for the amount of such note, when it appeared that the debtor, for whom he endorsed the note, as security, and from whom he had taken a transfer of his estate, as collateral security, had secretly given the plaintiff (the creditor) his own notes for the balance of his claim, in order to obtain his assent to the composition, and the

Digitized by Google

creditor had already received fifty cents on his claim.—Q. B.—*Arpin & Poulin*, 22 L. C. J., p. 331.

15. The endorser of composition notes is not discharged from liability thereon by the mere fact that the compounding creditor has secretly stipulated with the debtor that he shall pay them an amount in excess of the composition rate, as the condition of their consent to the composition; and especially, where the endorser, as the consideration of the endorsement, obtained a transfer of the insolvent's entire stock in-trade and assets which he still retained when sued on the composition notes. But the endorser is entitled to a deduction of all sums that the creditor has received in excess of the composition notes.—Q. B.—*Martin & Poulin*, 4 L. N., p. 20, 1 Q. B. R., p. 75.

16. Qu'un débiteur insolvable qui fait un acte d'atermoiement avec la masse de ses créanciers, et qui, pour obtenir la signature de l'un d'eux, lui fait un engagement particulier, où il est mieux traité que les autres créanciers, n'est pas reçu à quereller cet engagement particulier.—MATHIEU, J.—*Chapleau vs Lemay*, 14 R. L., p. 198.

17. Qu'un créancier peut saisir par saisie-arrêt une créance pour laquelle son débiteur est colloqué, quand même ce dernier se serait fait illégalement transporter cette créance, laquelle appartiendrait réellement à un tiers; le recours de ce tiers est contre le débiteur.—MATHIEU, J.—*Senécal vs Exchange Bank*, M. L. R., 2 S. C., p. 108.

18. Where a simulated sale of real estate was made at an over-valuation, and the seller took hypothecs for part of price and then transfered such hypothecs to a merchant, in payment of goods purchased, it was held that the merchant, on proving the fraudulent nature of the sale, could ask for personal condemnation against the seller for the goods sold. (C. C. 1012.)—Q. B.—*Black & Walker*, M. L. R., 1 Q. B., p. 214, 8 L. N., p. 67.

19. Where a debtor obtained his discharge under the provisions of the Insolvent Act of 1875, after secreting and transfering his property in his family and continues to do the same afterwards, his creditors may claim a debt previous to said discharge, and under such circumstances a capias will be held to be valid. —Q. B.—*Beaupré & Thibaudeau*, 3 Q. B. R., p. 384.

20. The proof that a sale has been made in fraud of creditors may be either direct or indirect, and in the present case, there is sufficient proof of fraud to set aside the deed.—C. R.—*Brais vs Racette*, 3 L. N., p. 398.

21. A. sold a certain lot of land to B., and it was agreed, that in default of payment of the price, A. might demand a resiliation of the deed. B. became insolvent, and A., knowing this, obtained a retrocession of the land at a less price. This was held to be fraudulent and was annulled.—TORRANCE, J.—*Prévost vs Gosselin*, 5 L. N., p. 381.

22. Qu'un contrat entre le saisi et le tiers-saisi, fait en fraude des créanciers du saisi, ne peut être annulé sur contestation de la déclaration de ce tiers-saisi, produite plus d'un an après jugement sur le principal, sans prorogation antérieure du délai susdit, si le contestant a eu connaissance de la fraude avant le jugement sur le principal.—C. R.—*Richard vs Michaud*, 8 Q. L. R., p. 244.

23. Qu'un créancier peut, par une tierce opposition, faire annuler un jugement prononçant la résolution d'une vente faite à son débiteur et obtenu par collusion et dans le but de le frauder à la poursuite d'un cessionnaire du vendeur.—JETTÉ, J.—*Longtin vs Longtin*, 16 R. L., p. 236.

Digitized by Google

24. See case noted at C. C. 1035 —C. R.—***Banque Nationale vs Chapman***, M. L. R., 3 S. C., p. 201.

See also cases noted at C. C. 1031 and 1035.

1033. A contract cannot be avoided unless it is made by the debtor with intent to defraud, and will have the effect of injuring the creditor.—*ff* L. 15, *Quæ in fraudem credit* ; Domat, liv. 2, tit. 10, s. 1, n. 6 ; Nouv. Den. art. 52, § 2, n. 9 ; 6 Toullier, nn. 348-352 ; C. L., 1973. [I. 53.]

1034. A gratuitous contract is deemed to be made with intent to defraud, if the debtor be insolvent at the time of making it.—*ff* L. 6, § 2, *loc. cit.* ; Domat, loc. cit., n. 2; Nouv. Den., vo. cit., § 1, n. 10 ; Pothier, 153 ; 6 Toullier, nn. 353, 354 ; C. L., 1975. [I. 53.]

DECISIONS :—1. An assignment without actual consideration is only a donation and the fraud of the debtor is sufficient to dispossess the donee.—BOWEN & BADGLEY, JJ.—***Barbour vs Fairchild***, 6 L. C. R., p. 114.

2. In the case submitted a donation *inter vivos* of real estate by a father to his minor children was tainted with fraud towards the creditors of the donor and consequently inoperative.—Q. B.—***Marion & Perrin***, 6 L. C. R., p. 404.

3. A bankrupt, purchaser of real property from the trustees to his estate, the requirements of the law having been duly observed, cannot revive a hypothecary claim which had subsisted upon the property and which had been extinguished by the sale made under legal authority. A subsequent purchaser sued hypothecarily by reason of such claim may urge by way of exception any fraud with which such claim may be tainted in consequence of its revival.—In the case submitted, a donation of the pretended heiress of a life rent to the minor children of the bankrupt, such rent being payable by the bankrupt and the latter accepting the donation for his children after the granting of his certificate of discharge and the sale of the property, is inoperative in relation to the purchaser and the declaration is declared fraudulent although the minors had not personally been participators in the fraud.—Q. B.—***Cadieux & Pinet***, 6 L. C. R., p. 447.

4. In the present case the donation of moveables contained in a marriage contract by the husband in favour of his wife, still a minor, with stipulation of *séparation de biens* is a fraud with respect to a person having a claim against the husband by reason of seduction and the wife cannot claim *main levée* of the seizure of such moveables made upon the husband in satisfaction of such claim. —BADGLEY, J.—***Chaput & Berry***, 12 L. C. R., p. 173.

5. In 1863 the Plaintiff obtained judgment against the Defendant for a debt due in 1861, under which judgment he seized certain property of the Defendant. An opposition was fyled by the son of the Defendant on the ground that the Defendant had made a donation of the property to the opposant in 1863, the consideration whereof was that the opposant should support the donor and his family, the right of usufruct of the estate being reserved by the donor. Under the circumstances of the case, the donation was held to be fraudulent.—C. R.—***Ward & Brown***, 1 L. C. L. J., p. 95.

Digitized by Google

6. A deed of donation of real estate will not be considered fraudulent because the donor had a chirographary creditor, who obtained judgment against him eighteen months after the donation, which was made for good consideration ; and the seizure and sale of the land donated in the donee's possession at the instance of the chirographary creditor will be set aside—C. R.—*Tessier vs Bienjonetti*, 1 L. C. L. J., p. 68.

7. Une donation d'immeubles non enregistrée par une sœur à son frère, après jugement rendu contre la donatrice, est évidemment faite en fraude du créancier.—C. R.—*McGillivray vs McCullen*, 5 R. L. p. 456.

8. Un acte de donation entre proches parents passé au moment où le donateur vient d'être assigné pour dette, en l'absence de preuve de bonne foi, est présumé frauduleux.—McCord, J.—*Lortie vs Dionne*, 4 Q. L. R. p. 299.

9. Qu'un acte de donation fait par un père à sa fille lorsqu'il est solvable, mais dans la vue d'entrer dans les affaires et de soustraire les biens donnés aux dettes qu'il pourrait contracter, serait annullé, sur la poursuite du syndic à la faillite du donateur, quoique les créanciers portés au bilan du failli soient tous postérieurs à la donation.—Q. B.—*Murphy & Stewart*, 12 R. L., p. 501.

10. Qu'un créancier peut attaquer, comme frauduleux, un acte de donation consenti par son débiteur antérieurement à son titre de créance, par lequel le débiteur donne à son fils majeur, qui demeure avec lui, ses biens mobiliers, quand cet acte a eu précisément pour objet de dépouiller à l'avance les créanciers futurs de leurs droits sur l'actif du débiteur.—C. R.—*Ivers vs Lemieux*, 5 Q. L. R., p. 129.

11. Qu'un acte de donation peut être annulé à la poursuite d'un seul des créanciers du donateur, et que la nullité qui est prononcée à telle poursuite, vaut pour tous les autres créanciers.—Mathieu, J.—*Prowse vs Simpson*, 13 R. L. p. 302.

12. A gift by a father to his daughter, in a marriage contract, which rendered him unable to meet his engagements, under circumstances creating a strong presumption that the donee knew it, was set aside by the Court of Queen's Bench, but, in the Supreme Court, the decision was reversed on a question of appreciation of evidence.—Supreme Court.—*Tracey & Ligget*, 9 S. C. R., p. 441, C. D. p. 137.—Q. B.—3 Q. B. R., p. 247.

13. That a donation in a marriage contract by an insolvent person to his wife, in fraud of his creditors, will be set aside, even though his wife had no share in the fraud. (C. C. 1038, 820.)—Meredith, C. J.—*Behan vs Erickson*, 7 Q. L. R., p. 295.

14. Qu'une donation consentie par le père insolvable à son fils pour lui payer du salaire qu'il peut lui devoir pour le temps qu'il a travaillé chez son père, après sa majorité, à un métier appris chez son père, sans convention pour salaire, est une donation à titre gratuit et faite en fraude des créanciers du père.—Mathieu, J.—*Leblanc vs Tellier*, 11 R. L., p. 341.

15. That the purchase of moveables from a solvent vendor, and the donation of the same by the purchaser to his daughter, wife, separate as to property of the vendor, in pursuance of a condition of the marriage contract of the two latter, will be sustained as legal and valid.—Q. B.—*Gagnon & Brissette*, 12 Q. L. R., p. 66, 14 R. L., p. 164.

16. A deed of donation may be set aside on contestation of the opposition filed by the donee invoking such deed.—C. R.—*Marin vs Bissonnette*, 1 L. N., p. 242.

Digitized by Google

1035. An onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud.—*ff* L. 1, L. 6, § 8, *Quæ in fraudem credit*; Domat. *loc. cit.*, n. 4; Nouv. Den., *loc. cit.*, nn. 12, 15; 6 Toullier, nn. 342-366. [I. 53.]

DECISIONS:—1. As to what constitutes sufficient proof of fraudulent transfer by an insolvent debtor.—Q. B.—*Sharing & Meunier*, 7 L. C. R., p. 250.

2. In order to set aside a deed of assignment on the ground of fraud the insolvency of the assignor must be alleged and proved.—CHABOT, J.—*Bernier & Vachon*, 8 L. C. R., p. 286.

3. All the effects of an insolvent debtor become and are the common property of the creditors and such goods cannot be taken from the control of any of them by the acts of the debtor. Any assignment made by an insolvent debtor with a view of withdrawing his effects from the action of the whole or any of his creditors is absolutely null under the provisions of the Edict of the month of May 1609.—In the case submitted, the title invoked by the Respondents was a deed tainted with the vices above mentioned and moreover this deed, which was an asssignment of all the effects of the insolvent debtor to the Opposants, was not followed by legal tradition or by a *déplacement* in such way as to vest the effects transferred in the Opposants.—Q. B.—*Cummings & Smith*, 10 L. C. R., p. 122.

4. An insolvent debtor cannot transfer or assign over his stock in trade to two of his creditors in trust for the benefit of the whole of his creditors, without the consent of all such creditors. Where such an assignment is made without the consent of the whole of the creditors and the assignees having obtained the key from the debtor, the assignor, lock up the shop, take an inventory and advertise the goods for sale by auction for the benefit of the creditors generally, any of the non-consenting creditors may notwithstanding seize the goods as being still in the possession of the debtor or assignor, there being no sufficient transfer or delivery in law to transfer the property or possession to the assignee.—Q. B.—*Withell & Young*, 10 L. C. R., p. 149.

5. A donation from father and mother to a son of all their property will be set aside as in fraud of creditors notwithstanding that the donation is subject to the maintenance of the donors during their life time.—BERTHELOT, J.—*Lavallée vs Laplante*, 10 L. C. R., p. 224.

6. A sale of real property made by a son to the father will be declared simulated and fraudulent and will be set aside at the instance of creditors, notwithstanding proof of payment of the price of sale, upon sufficient evidence that the father had no pecuniary means.—Q. B.—*McGrath & O'Connor*, 14 L. C. R., p. 393.

7. An opposition to the sale of moveables alleged to have been acquired at a sheriff's sale will be dismissed as fraudulent, it being proved that no consideration was paid for the effects, that the defendant was insolvent and that the opposant and the party at whose suit the alleged judicial sale was made were both the brothers of the defendant.—Q. B.—*Brough & McDonnell*, 15 L. C. R., p. 493.

8. A direct action will lie to have a sale of moveables set aside for fraud; and this though a judicial sale has been resorted to.—Q. B.—*Ouimet & Senécal*, 4 L. C. J., p. 133.

Digitized by Google

9. One of the circumstances which throws ordinarily most light on the bad faith of third parties, is the notoriety of the distress of the debtor. Whoever makes with him an agreement prejudicial to his creditors, will have difficulty in maintaining his exception of good faith. At any rate, the presumption will be against him until he has proved that the notoriety had not reached him. It is an indication of fraud in the alienation of property by a debtor, that the employment of the price of the alienation does not appear. When the books of a trader do not show any entries of a transaction in question, or payments on account thereof, there is a legal presumption against its truth. A deed of sale by a debtor to his brother-in-law, and another by his brother-in-law to his wife will be set aside at the suit of a creditor as simulated and fraudulent where there is no valid consideration for such sale.—McCord, J.—*Rimmer vs Bouchard*, 7 L. C. J., p. 219.

10. L'hypothèque acquise sur les biens d'un individu *non-négociant* en état de déconfiture, est valable en loi s'il n'y a fraude.—C. R.—*McConnell vs Dixon*, 11 L. C. J., p. 300.

11. Mere insolvency is not of itself a sufficient cause for setting aside a mortgage granted whilst the debtor was in that state, without proof either that such insolvency was notorious or that there was really fraudulent collusion between the debtor and creditor.—C. R.—*Warren vs Shaw*, 12 L. C. J., p. 309.

12. The defendant, five days before judgment was obtained against him, sold his farm and farm stock to the opposant, who leased the property back to him two days after judgment.—*Held:* That the transaction was fraudulent, and that there was no tradition of the property, Monk, J., differing as to the latter point.—C. R.—*Desjardins vs Pagé*, 1 L. C. L. J., p. 115.

13. Une vente faite par un failli, après l'émanation d'un bref en liquidation forcée et la publication des avis de faillite, est radicalement nulle, et dans le cas de telle vente, l'acquéreur ne peut invoquer sa bonne foi, et demander le remboursement du prix d'achat, en vertu de l'article 1480 du Code Civil.—Q. B.—*Mallette vs White*, 1 R. L., p. 711.

14. La vente d'effets mobiliers, entre parents, non suivie de déplacement et de tradition réelle, est présumée frauduleuse vis-à-vis des tiers créanciers et doit être annulée.—C. R.—*Davis & Shaw*, 1 R. C., p. 120.

15. Le fait d'entrer en marché de vendre et de vendre en effet tous ses meubles de ménage et surtout tous les outils de son métier est un avertissement suffisant que le vendeur donne à l'acheteur de son insolvabilité et de son intention de frauder ses créanciers.—Polette, J.—*Trahan vs Gadbois*, 5 R. L., p. 690.

16. Une vente faite par un débiteur à un tiers, sera annulée sur la poursuite d'un créancier, quant à lui;—1. Si le vendeur était insolvable, ou s'est, par l'effet de cette vente, mis sciemment et frauduleusement hors de l'atteinte du créancier;—2. Si l'acheteur connaissait l'existence de la dette due au créancier;—3. Si l'acheteur connaissait, lors de la vente, l'état d'insolvabilité du vendeur, ou du moins que par cette vente ce dernier se mettait hors de l'atteinte des poursuites du créancier;—4. Si le contrat a eu l'effet de nuire au créancier.—Bélanger, J.—*Clément vs Catafard*, 8 R. L., p. 624.

17. The circumstances of this case do not disclose fraud, concealment or collusion or any attempt whatever by plaintiff to obtain a preference over other creditors. There is no principle of common law, statutory provision or rule of public policy sanctioned by jurisprudence, requiring that all creditors being parties to a deed of composition should, irrespective of the existence of good or bad

Digitized by Google

faith, detriment, injustice or inducement, or otherwise, be in perfectly the same position to the extent of invalidating security given to one or more creditors, because others had not received it.—McCord, J.—*Bank of Montreal vs Audette*, 4 Q. L. R., p. 254.

18. Lortie devait à Clarke $177.71. A la veille d'être poursuivi, il vend sa maison à Allard, son gendre, lequel connaissait l'existence de la dette. *Jugé*:—Que la vente en question est frauduleuse.—C. R.—*Clarke vs Lortie*, 4 Q. L. R., p. 293.

19. Il n'est pas prouvé dans l'espèce qu'à la date de l'exécution du transport fait par D. et W. à la Banque Stadacona, cette dernière avait raison de connaître ou de croire que c'était en vue de la faillite.—Q. B.—*Banque Stadacona & Walker*, 10 R. L., p. 381.

20. Une obligation consentie par un débiteur à son créancier moins d'un mois avant la mise en faillite du premier, est nulle. Ce créancier est présumé avoir connu l'insolvabilité de son débiteur, si, trente jours après avoir obtenu telle obligation, il a produit une déposition à l'effet de faire émaner un bref de saisie contre les biens de ce débiteur, qu'il accusait d'insolvabilité notoire.—Q. B.—*Banque d'Hochelaga & Banque Union du Bas-Canada*, 12 Q. L. R., p. 377, 14 R. L., p. 410.

21. One of the Defendants sold real estate to the other Defendant, who was his nephew as well as book keeper of a firm in which the uncle was a partner, and the sale took place at a time when, in the opinion of the court, the insolvency of the uncle was generally known. *Held*:—That the nephew must be presumed to have had a knowledge of the uncle's insolvency and the sale was therefore annulled.—C. R.—*Banque Nationale vs Chapman*, M. L. R., 3 S. C., p. 201.

22. T. F., a hotel keeper, being largely indebted, sold to A. B., his principal creditor, on the 13th January 1875, by notarial deed, duly registered, certain moveable and immoveable property, being the bulk of his estate, comprising the hotel and furniture, for $15,409.50. The immoveable property, valued by official assessors at $22,000, was sold for $10,000. The sale was also made subject to the right of redemption by F., on reimbursing, within three years, the stipulated price of $15,409.50 and interest at the rate of eight *per cent*, with a provision that, in case of insolvency, or default of payment, this right of *reméré* should cease. No delivery took place, and ten months later F., who remained in possession of the property under a lease from A. B. of the same date as that of the sale, also became bankrupt. In the meantime A. B., with F.'s consent, had, leased the furniture to T. & J., in whose hands it was when appellant (F.'s assignee) revendicated it as part of the insolvent estate. T. & J. did not plead, but A. B., intervened and claimed the effects, under the deed of sale above mentioned. The assignee contested the intervention, alleging that the deeds passed on the 19th January 1875, had been made by I. F. in fraud of his creditors. Held:—That there was sufficient evidence to prove that the object of the transaction was to defeat F.'s creditors generally, and therefore the deeds of sale and lease of the 19th January 1875 were null and void under C. C. 993, 1033, 1035 and 1040 and sections 86 and 88 of the Insolvent Act of 1869 and section 3 and section 13 of the Insolvent act of 1875.— Supreme Court.— *Rickaby & Bell*, 2 S. C. R., p. 560, C. D., p. 187.

23. A sale of moveables (not in the ordinary course of business) by a trader, when actually insolvent, though he did not become an insolvent under the Act until

Digitized by Google

two months afterwards, to a creditor who knows, or has reason to know of his insolvency the price being credited by the purchaser to his debtor, is fraudulent, and null and void, though the creditor may have allowed the full value of such articles on account of his claim.—Q. B.—*Kane & Racine*, 24 L. C. J., p. 216.

24. Where drafts and notes are placed with a bank by a debtor of the bank, not as collateral security, but for collection, compensation does not take place until the bank has received the amounts collected by them on such notes; and, in the present case, the debtor having become insolvent before any amounts were received on such notes, compensation did not take place between the amount collected by the bank and the debt due to it.—Q. B.—*Exchange Bank of Canada & Canadian Bank of Commerce*, M. L. R., 2 Q. B., p. 476, 10 L. N., p. 110. —TORRANCE, J.—M. L. R., 1 S. C., p. 225.

25. A gift by contract of mariage by the intended husband to the wife, is not an onerous contract and is liable to be set aside, if the donor, at the time it was made, was, and knew himself to be, insolvent, and this, without proof of bad faith on the part of the donee.—MEREDITH, C. J.—*Behan vs Erickson*, 7 Q. L. R., p. 295, 5 L. N., p. 48.

26. That the circumstances that the purchaser was the daughter of the vendor, and that she had no apparent means to purchase the property, and from her position was not likely to have made savings to pay for it, were sufficient presumptions of fraud in the absence of any evidence to the contrary, to annul the sale.—Q. B.—*Paige & Evans*, 1 Q. B. R., p. 352.

See also cases noted at C. C. 1032.

1036. Every payment by an insolvent debtor to a creditor knowing his insolvency, is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount or thing received or the value thereof, for the benefit of the creditors according to their respective rights. —*ff loc. cit.*, L. 10, § 12; Nouv. Den. *loc. cit.*, 2e col.; L. 6, § 6 *ff Quæ in fraudem credit*; Jousse, *Ord.*, 1673, tit. 11, art. 4, n. 1; Savary, *Parère* 39, pp. 312, 319, 320; 6 Toullier, as cited above; Bornier, *Ord. du Com.*, tit. 11, art. 4, p. 698 (673 in later edition); Toubeau, liv. 3, tit. 12, c. 3, p. 730, *contrà*, Code Com., art. 446, 447, and notes by Devilleneuve, Dict. du Contentieux Com., pp. 744, 745, and by Rogron, pp. 878, 879 et seq. C. L., 1983. [I. 55.]

DECISIONS:—1. Qu'un paiement fait par un débiteur insolvable à un créancier qui connaît cette insolvabilité, est nul, et que le créancier sera tenu de remettre la somme reçue au préjudice des autres créanciers.—Q. B.—*Hodgson & Banque d'Hochelaga*, 15 R. L., p. 75.

2. A creditor who alleges that his debtor, while insolvent, has made payments to another creditor, knowing his insolvency, has a right to sue the latter in his own name and to ask that such sum be paid into Court for the benefit of the creditors generally.—Q. B.—*Boisseau & Thibaudeau*, 7 L. N., p. 274.

3. Que les créanciers d'un débiteur insolvable qui a remis des marchandises au vendeur non payé, ne peuvent obliger les vendeurs qui ont repris leurs marchandises de les remettre à la masse, vu que ces créanciers ne peuvent se

Digitized by Google

plaindre de cette remise, attendu que ces marchandises n'ont pas été payées, et que le vendeur avait un privilège sur icelles pour le prix de vente (C. C. 1543.)— Q. B.—*Boisseau & Thibaudeau*, 12 R. L., p. 673.

4. Similar decision, Q. B.—*Thibaudeau & Mills*, 29 L. C. J., p. 149. (But see Act Q. 48 V., c. 20, s. 1, noted at C. C. 1543.)

1037. Further provisions concerning the presumption of fraud and the nullity of acts done in contemplation of insolvency are contained in the Insolvent Act of 1864. [I. 55, III. 381.]

Amendment.—Insolvent Act repealed by D. 43 Vict., cap. 1.

1038. An onerous contract made with intent to defraud on the part of the debtor, but in good faith on the part of the person with whom he contracts is not voidable; saving the special provisions applicable in cases of insolvency of traders.—L. 6, § 8, *loc. cit.* art. 54 (59); Pothier, 153; Domat, n. 3, *loc. cit.*; N. Den., *loc. cit.*, n. II, 6 Toullier, n. 352; C. L., 1974. [I. 55, III. 381.]

1039. No contract or payment can be avoided, by reason of any thing contained in this section, at the suit of a subsequent creditor, unless he is subrogated in the rights of an anterior creditor; saving, nevertheless, the exception contained in The Insolvent Act of 1864. —L. 10, § 1, *Quæ in fraudem credit;* 9 N. Den., vo. cit., § 3, n. 1, 2, 3, vo. 9, pp. 84, 85; Domat, *loc. cit.*, n. 6; 6 Toullier, n. 351; C. L., 1988. [I. 55, III. 381.]

Amendment.—Insolvent Act repealed by D. 43 Vict., cap. 1.

DECISIONS:—1. Qu'un créancier peut attaquer, comme frauduleux, un acte de donation consenti par son débiteur, antérieurement à son titre de créance, par lequel le débiteur donne à son fils majeur, qui demeure avec lui, ses biens mobiliers, quand cet acte a eu précisément pour objet de dépouiller, à l'avance, les créanciers futurs de leurs droits sur l'actif du débiteur.—C. R.— *Ivers vs Lemieux*, 5 Q. L. R., p. 129.

2. Qu'un acte de donation fait par un père à sa fille, quand il est solvable, mais dans la vue d'entrer dans les affaires et de soustraire les biens donnés, aux dettes qu'il pourrait contracter, sera annulé, sur la poursuite du syndic à la faillite du donateur, quoique les créanciers portés au bilan du failli, soient tous postérieurs à la donation.—Q. B.—*Murphy & Stewart*, 12 R. L., p. 501.

1040. [No contract or payment can be avoided by reason of any thing contained in this section, at the suit of any individual creditor, unless such suit is brought within one year from the time of his obtaining a knowledge thereof.

If the suit be by assignees or other representatives of the creditors collectively, it must be brought within a year from the time of

Digitized by Google

their appointment.]—*ff* L. 1, *Ait Prætor*; *Quæ in fraudem cred.*; L. 6, § 14: 6 Toullier, 356; C. L, 1989. [I. 55 to 57.]

Amendment.—The period of time between the first of February, one thousand eight hundred and seventy-three, and the first day of September, one thousand eight hundred and seventy four next is, in so far as proceedings or matters before the said court of Queen's bench, superior court, and circuit court in the district of Quebec are concerned, which relate to records destroyed in whole or in part by the said fire, excluded from the operation of articles 1040, 1550, 1998, 1999, 2242, 2243, 2250, 2251, 2252, 2258, 2259, 2260, 2261, 2262, 2263, 2267 and 2268, of the Civil Code of Lower Canada, and of articles 454, 483, 506, 947, 1118, and 1119, of the code of civil procedure; and with reference to the said articles of the Civil Code and of the code of civil procedure, the first day of September next shall he reckoned as the day immediately following the first day of February, one thousand eight hundred and seventy-three. — Q. 37 Vict., cap. 15, s. 19.

CHAPTER SECOND.

OF QUASI-CONTRACTS.

1041. A person capable of contracting may, by his lawful and voluntary act, oblige himself toward another, and sometimes oblige another toward him, without the intervention of any contract between them.—Instit. lib., 3, tit. 27; Pothier, 113, 114, 115; 5 Marcadé, p. 249; C. N., 1371. [I. 57.]

DECISION:—Where a landowner has empowered his agent to alienate and such agent has, without a completed contract to sell, allowed an intending purchaser to take possession of a plot of land and effect substantial improvements on the reasonable expectation of obtaining a transfer on paying the proper price and then transfer to the defendant, who, in turn, effected improvements. *Held:*—That such landowner had thereby laid himself under an obligation such as in C. C. 1041 is called a *quasi-contract* to confirm the Defendant's possession and title upon payment of the price thereof according to the rate ruling at the time of commencing the improvements with interest from that date.—PRIVY COUNCIL.—*Price & Nault*, 12 APP. CAS., p. 110, 13 Q. L. R. p. 287.—Q. B.—4 Q. B. R., p. 348, 11 Q. L. R., p. 309.

1042. A person incapable of contracting may, by the quasi-contract which results from the act of another, be obliged toward him.—Pothier, *Oblig.*, 115, 128; 5 Marcadé, p. 249. [I. 57.]

Digitized by Google

DECISIONS:—1. Where some of the inhabitants of an old municipality wanted it divided into two, and petitioned Parliament for that purpose and got a statute passed effecting their object, employing the Plaintiffs professionally to get it done, and the Plaintiffs sued the new corporation to recover the value of their services, the action was maintained.—JOHNSON, J.—*DeBellefeuille vs Corporation du Village de St Louis du Mile-End*, 2 Thémis, p. 193.

2. A. was employed, through the instrumentality of W., by divers persons who had signed a petition for the purpose of obtaining letters patent for the incorporation of a Company. The parties failed to pay A. for his services, whereupon he issued an action to recover the amount of the value of his services. *Held*:—That the parties signing the petition were benefited by the work of the Plaintiff, and were therefore liable for the value of such services.—C. R.—*Atwater vs Importers and Traders Company*, 31 L. C. J., p. 52.

SECTION I.—OF THE QUASI-CONTRACT *Negotiorum gestio.*

1043. He who of his own accord assumes the management of any business of another, without the knowledge of the latter, is obliged to continue the management which he has begun, until the business is completed or the person for whom he acts is in a condition to provide for it himself; he must also take charge of the accessories of such business.

He subjects himself to all the obligations which result from an express mandate.—Instit., lib. 3, tit. 27, § 1; *ff* lib. 3, tit. 5; L. 2, 3, 6, 32; Pothier, *Oblig.*, 115; Pothier, *Mandat*, 29, 180, 201; Domat, liv. 2, tit. 4, sec. 1, nn. 1, 2; Troplong, *Mandat*, 70, 71, 72; 5 Marcadé, p. 250, on art. 1372; 11 Toullier, nn. 25 et seq.; C. N., 1372. [I. 57.]

1044. He is obliged to continue his management although the person for whom he acts die before the business is terminated, until such time as the heir or other legal representative is in a condition to take the management of it.—*ff* tit. cit., L. 21; Pothier, *Mandat*, 201; C. N., 1373. [I. 57.]

1045. He is bound to exercise in the management of the business all the care of a prudent administrator.

Nevertheless the court may moderate the damages arising from his negligence or fault, according to the circumstances under which the management of the business has been assumed.—*ff* tit. cit., L. 11, L. 3, § 9; Pothier, *Mandat*, 208, 211; Domat, liv. 2, tit. 4, sec. 1, nn. 2, 12; C. N., 1374. [I. 57.]

1046. He whose business has been well managed is bound to fulfil the obligations that the person acting for him has contracted in his

Digitized by Google

name, to indemnify him for all the personal liabilities which he has assumed, and to reimburse him all necessary or useful expenses.—*ff* tit. cit., L, 2, 22, 45; Pothier, *Oblig.*, 113, 115, 221, 223, 224, 228; Domat, liv. 2, tit. 4, sec. 2, nn. 2, 3, 4; C. N., 1375. [I. 57 to 59.]

DECISIONS:—1. Qu'un commerçant insolvable, qui est soudainement frappé d'aliénation mentale, n'aura pas de recours en dommage contre un de ses créanciers qui, sans opposition formelle de la famille du commerçant, se sera emparé de son fonds de commerce et en aura disposé de bonne foi et pour un prix en représentant la valeur réelle, pour son bénéfice et celui des autres créanciers du commerçant.—MATHIEU, J.—*Martin dit Versailles vs Grenier*, 12 R. L., p. 604.

2. Where the mayor of the municipality, acting with prudence and from necessity, in a matter of urgency, contracts an obligation on behalf of the municipality, the latter should be held liable.—TORRANCE, J.—*Chevalier vs Municipalité de St. François de Salles*, 9 L. N., p. 290.

SECTION II.—OF THE QUASI-CONTRACT RESULTING FROM THE RECEPTION OF A THING NOT DUE.

1047. He who receives what is not due to him, through error of law or of fact, is bound to restore it; or if it cannot be restored in kind, to give the value of it.

[If the person receiving be in good faith, he is not obliged to restore the profits of the thing received.] — 13 Duranton, 601, 602, 604; 11 Toullier, 94; Instit., lib. 3, tit. 7, L. 6, § 7, *ff* § 3, L. 5, *De oblig. et action.*; L. 1, 2, § 1; L. 7, 37, 54, *De condict. indeb.*; L, 9, § 5, *De jure et facti ignorantiâ*; Cod., L. 10, *eodem tit.*; Pothier, *Condict. indeb.*, 132, 140, 165, 168; Domat, liv. 2, tit. 7, sec. 1, n. 5 et n. 1, sec. 3, nn. 3, 4, note, vol. 2, p. 469; C. N., 1376. [I. 59.]

DECISION:—L'action en restitution de l'indû ne se prescrit que par 30 ans, alors même que son exercice suppose l'annulation préalable d'un contrat dont la rescision se prescrit par un temps plus court.—C. R.— *Ursulines des Trois-Rivières vs Commissaires d'Ecoles de la Rivière-du-Loup*, 3 Q. L. R., p. 323.

1048. He who pays a debt believing himself by error to be the debtor, has a right of recovery against the creditor.

Nevertheless that right ceases when the title has in good faith been cancelled or has become ineffective in consequence of the payment; saving the remedy of him who has paid against the true debtor.—*ff* L. 65, *fin.*, *Cond.*, *indeb.*; Pothier, *Oblig.*, 113; Pothier, *Condic. indeb.*, 153; Domat, liv. 2, tit. 7, sec. 1, n. 2; C. N., 1377. [I. 59.]

DECISIONS:—1. The amount voluntarily paid on a protested Bill of Exchange, by the drawer cannot be recovered on the ground of an error in the payment, in point of law.—K. B.—*Caldwell & Patterson*, 2 R. de L., p. 27.

Digitized by Google

2. Une *erreur de droit* may give rise to an action for the recovery back of money paid. In the case submitted, a party who has voluntarily paid a tax imposed by a by-law of a municipal corporation, which by-law is declared by the court to be void, has a right to recover back what he has so paid.—Q. B.—*Leprohon & City of Montreal*, 2 L. C. R., p. 180.

3. A prothonotary is not entitled to demand any fee upon the contestation of the certificate of a registrar filed pursuant to law. The prothonotary having demanded and received such fee, the party who has paid the same is entitled to recover it back and the court will, upon action, order the prothonotary to refund the amount so paid.—STUART, J.—*Langlois vs Walton*, 12 L. C. R., p. 236.

4. An action *condictio indebiti* lies to recover back money which has been paid, but under protest, in satisfaction of a prescribed debt, when illegal coercion has been employed to obtain the payment.—Q. B.—*Corporation of Quebec & Caron*, 10 L. C. J., p. 317.

5. Le règlement d'un conseil municipal ordonnant le prélèvement d'une somme de deniers " pour payer les dettes de la corporation et les dépenses du conseil municipal, pour l'année 1869," sans indiquer, d'une manière précise et déterminée, ces dépenses et ces dettes, est contraire à la lettre et à l'esprit de la loi municipale, et doit être déclaré nul et illégal.—Tout contribuable qui a payé des taxes en vertu de tel règlement, peut, en invoquant la nullité, la répéter de la corporation.—SICOTTE, J.—*Dubois vs Corporation du village d'Acton Vale*, 2 R. L., p. 565.

6. La femme séparée de biens qui, s'étant rendue caution pour son mari, acquitte son cautionnement, a droit de répéter ce qu'elle a ainsi payé.—Q. B.—*Buckley & Brunelle*, 21 L. C. J, p. 133.

7. A person who pays money for assessment under an assessment roll made by commissioners after the time appointed for them to report, and when they were *functi officio*, is entitled to restitution.—MACKAY, J.—*Wilson vs City of Montreal*, 1 L. N., p. 242. (See judgment in Appeal, case No. 16 *supra*.)

8. Where a bank draws a draft of $25 on one of its branches and fails to advise such branch of the fact, and the draft is afterwards raised to one for $5,000, and so skilfully as to deceive the branch office, which pays the amount of the draft so raised to another bank, holding the draft in good faith, and in consequence of such payment, the latter bank pays $3,500 on account thereof to the person from whom the bank received it, the former bank cannot recover from the latter bank the amount so paid by it.—Q. B.—*Union Bank of Lower Canada & Ontario Bank*, 24 L. C. J., p. 309, 1 Q. B. R., p. 38, 3 L. N., p. 386.

9. Money restored on an assessment roll being set aside, is restored without interest, the money being collected *bonâ fide*.—Q. B.—*Baylis & Mayor of Montreal*, 23 L. C. J., p. 301, 2 L. N., p. 340.

10. Similar decision.—Q. B.—*Brisson & Mayor of Montreal*, 2 L. N., p. 341.

11. Where a person paid, what subsequently proved to be an illegal tax, during three years in succession, without contesting its validity, the same may be recovered by the person who paid it.—Q. B.—*City of Montreal & Walker*, M. L. R., 1 Q. B., p. 469.

12. A case of supposed over-payment, which was decided on facts.—Q. B.—*Société de Construction de Montarville & Robitaille*, 1 Q. B. R., p. 225.

13. Another case of supposed over-payment, also decided on facts.—Q. B.—*Kneen & Coon*, 3 Q. B. R., p. 55.

Digitized by Google

14. Que celui qui paie volontairement à un notaire le montant d'un compte qu'il lui a présenté, n'a pas le droit, si plus tard, il est établi que la valeur des services rendus est au-dessous du montant du compte, de recouvrer la différence. —Q. B.—*Fradet & Guay*, 11 R. L., p. 531.

15. Qu'un catholique romain, propriétaire de terrain dans les limites d'une municipalité scolaire, ayant des écoles dissidentes, qui est taxé, par les syndics des écoles dissendentes en contravention aux sections 57 et 58 du chapitre 15 des S. R. B. C., et qui paie cette taxe, par erreur, peut répéter en justice le montant par lui payé.—MATHIEU, J.—*Séguin vs Syndics de la Minorité Dissidente de la Municipalité de la Pointe Fortune*, 14 R. L., p. 235.

16. Where plaintiff paid his taxes under protest and to save proceedings in execution, with which he says he is threatened, and the assessment roll is subsequently set aside, he can only recover interest on moneys paid from date of judicial demand of repayment, if the corporation received it in good faith.—Q. B. —*Wilson & City of Montreal*, 3 L. N., p. 282, 24 L. C. J., p. 222. — MACKAY, J.— 1 L. N., p. 242 (*ante* n. 7.)

17. That assessments voluntarily paid, in accordance with a duly homologated assessment roll, cannot be recovered from the corporation without alleging specially that the payment was made through error of law or of fact.—LORANGER, J.—*Haight vs City of Montreal*, M. L. R., 3 S. C., p. 65.

18. That a person who is sued for a debt which has been already paid and who, being unable at the time to prove payment, allows judgment to be obtained *ex parte* and pays the amount of the judgment, has a right, on establishing the fact of the previous payment, to recover the amount so paid and the exception of *chose jugée* cannot in such case be opposed to the demand.—GILL, J.—*Rohdt vs Gagnon*, 11 L. N., p. 186.

19. Qu'un individu qui a loué une maison où il réside avec sa famille et où il tient une école conduite par plusieurs instituteurs et fréquentée par un grand nombre d'élèves, et qui a payé au propriétaire les taxes qu'il s'était obligé de payer par le bail, et que ce dernier a payé à l'autorité municipale, n'a pas de recours contre ce propriétaire pour se faire rembourser le montant des taxes par lui payées, parcequ'il serait exempté du payement des taxes sous les dispositions des statuts de Québec de 1878, (41 V. cap. 6 sec. 26,) et que son seul recours, s'il en a un, est contre l'autorité municipale.—MATHIEU, J.—*Brown vs Mowat*, 16 R. L., p. 170.

1049. If the person receiving be in bad faith he is bound to restore the sum paid or thing received, with the interest and profits which it ought to have produced from the time of receiving it, or from the time that his bad faith began. —*ff* L. 65, § 5; L. 15, *De condic. indeb.*; Pothier, *Condic. indeb.*, 168; Domat, liv. 3, tit. 5, sec. 3, n. 4, liv. 2, tit. 7, sec. 3, n. 1; C. N., 1378. [I. 59.]

DECISION :—Dans une action en répétition, *condictio indebiti*, par une femme séparée de biens, par suite de la nullité de son cautionnement, les intérêts ne lui seront accordés, lorsque le débiteur des deniers réclamés est de bonne foi, que du jour de l'assignation.—Q. B.—*Buckley & Brunelle*, 21 L. C. J., p. 133.

See also cases noted at C. C., 1048.

Digitized by Google

1050. If the thing unduly received be a thing certain, he who has received it is bound to restore its value, if through his fault and his bad faith it have perished or deteriorated, or can no longer be delivered in kind.

If he have received the thing in bad faith, or after having been put in default retain it in bad faith, he is answerable for its loss by a fortuitous event; unless the thing would have equally perished or deteriorated in the possession of the owner.—*ff* L. 62, *in pr.*, § 1; L. 15, § 3, *De rei vindic.*; L. 31, § 3, *De hæred. petitione*; Pothier, *Condic. indeb.*, 172, 174; Domat, liv. 2, tit. 7, sec. 3, n. 2; Marcadé, p. 258, 259; C. N., 1379. [I. 59.]

1051. If he who has unduly received the thing sell it, being in good faith, he is bound to restore only the price for which it is sold. —*ff* L. 26, § 12, *De condic. indeb.*; Pothier, 173; Domat, liv. 2, tit. 7, sec. 3, n. 5; C. N., 1380. [I. 61]

1052. He to whom the thing is restored, is bound to repay to the possessor, although he were in bad faith, the expenses which have been incurred for its preservation.—*ff* L. 13, § 1, L. 14, *De condic. indeb.*; *ff* L. 6, § 3, *De negot. gestis*; *ff* L. 38, *De hæred petit*; Pothier, *Propriété*, 343, 344, 345; Domat, liv. 2, tit. 7, sec. 4; 4 Marcadé, p. 262; C. N., 1381. [I. 61.]

CHAPTER THIRD.

OF OFFENCES AND QUASI-OFFENCES.

1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.—*ff* L. 1, *De injuriis*, L. 5, § 1, L. 9, § *ult.*, L. 10, *Ad leg. Aquil.*; Domat, liv. 3, tit. 5, sec. 2, n. 9, L. 2, tit. 8, sec. 4; 11 Toullier, 319 et seq.; 5 Marcadé, pp. 264, 265, 266; Zachariæ, vol. 4, § 624, note 2, § 625, note 14 et §§ 626, 627, 628; C. N., 1382, 1383. [I. 61.]

Amendments.—Memo: See an Act intituled: "An Act respecting abuses prejudicial to agriculture", which relates to damages by trespass on the property of others, damages caused by animals, damages caused by dogs, damages caused by obstructions upon lands, rivers and streams, &c., &c.

Digitized by Google

See also, regarding animals affected by contagious diseases.—Q. 29-30 Vict. cap. 33.

Also Municipal Code, article 1086.

DECISIONS :—Summary of the decisions noted hereunder:

RAILWAY ACCIDENTS, (*a*) *General*, Nos. 1–11.

RAILWAY ACCIDENTS, (*b*) *Injuries to cattle*, 12–16.

RAILWAY ACCIDENTS, (*c*) *Damages by fire*, 17–21.

STREETS ACCIDENTS, 22–60.

MARINE ACCIDENTS, 61–66.

GENERAL ACCIDENTS, 67–76.

ACCIDENTS CAUSED BY HORSES, 76 and cases noted at C. C. 1055.

LIBELS—BY NEWSPAPERS, 77–90.

LIBEL AND SLANDER, (*a*) *Privileged communications*, 91–100.

LIBEL AND SLANDER, (*b*) *Miscellaneous*, 101–122.

FALSE ARRESTS, (*a*) *by policemen*, 123–127.

" " (*b*) *miscellaneous*, 128–150.

DAMAGES TO REAL ESTATE, 151–173.

DAMAGES *arising from acts of Public Officials*, 174–185.

DAMAGES *arising from Civil Suits*, 186–205.

DAMAGES *arising from Assaults*, 206–214.

DAMAGES (*a*) *Seduction and breach of promise*, 224–229, 255 and 257.

DAMAGES *miscellaneous*, 215–223, 230–261.

MEASURE OF DAMAGES, 262–306 and cases noted at C. C. 1072 et seq.

Railway Accidents :—1. In an action of damages arising from a railway accident, which resulted in the death of a party and the destruction of a horse and waggon in which he was drawn, without specific proof of the pecuniary value of the party's life, damages may be assessed by the jury and be recovered beyond the mere value of the horse and waggon, as a *solation* to the widow and next of kin for their bereavement.—Q. B.—*Ravary & Grand Trunk Ry.*, 6 L. C. J., p. 49.

2. The party sueing for damages arising from imputed culpable fault or negligence on the part of the Defendant must himself be without any misconduct or fault and have used ordinary care. When an injury has resulted from the negligence of both parties, more especially if without any wanton or intentional wrong on the part of either, an action will not lie. To sustain an action in damages resulting from negligence on the part of the Defendant, the burden of proof to show such wilful negligence or otherwise is on the Plaintiff, who is further bound to show ordinary care by himself or that, if he himself did not exercise ordinary care, that this did not contribute to the alleged injury. There must be affirmative proof of due care at the time of the accident. When damage is done by a party in the exercise of his lawful rights the Plaintiff must prove that the loss occured without his fault and by the neglect of the Defendant. Though the Defendant be guilty of gross negligence, causing damage to the Plaintiff, yet, where the Plaintiff was guilty of want of ordinary care, contributing essentially to the injury, he cannot recover.—C. R.—*Moffette vs Grand Trunk Ry.*, 16 L. C. R.,p. 231.

3. When a train was derailed by the breaking of a rail and a passenger injured, it was held that the railway company was responsible, even though they proved that the rail was of good quality and had stood the necessary tests, and that the breakage was due to change of temperature, and that the traveller has not to prove the fault of the Company but that the latter has to prove that it is

Digitized by Google

RAILWAY ACCIDENTS, (*Continued*) :—

not responsible.—MATHIEU, J.—*Chalifoux vs Canadian Pacific Railway Company* M. L. R., 2 S. C., p. 171, 14 R. L., p. 149.

Confirmed in the Court of Queen's Bench.—Q. B.—31 L. C. J., p. 261, M. L. R., 3 Q. B., p. 324.

4. Qu'une compagnie de chemin de fer est tenue de transporter ses passagers sains et saufs à leur destination, et que, dans une poursuite en dommages résultant d'un accident arrivé sur le chemin de fer, la Cour présumera faute de la part de la compagnie et de ses employés, si la compagnie ne fait pas voir que l'accident était le résultat d'une cause qu'elle ne pouvait contrôler.—MATHIEU J. —*Wood vs Compagnie de Chemin de Fer du Sud-Est*, 13 R. L., p. 567.

5. In this case the Plaintiff was awarded $7,000 damages for injuries received in a railway accident.—PRIVY COUNCIL.—*Lambkin & South Eastern Ry. Co.*, 5 App. Cas p. 352, 3 L. N., 162, R. A. C., p. 970.

6. That even where a railway company is in fault for not stopping its train at a station to which it has contracted to carry a passenger, nevertheless, an action of damages will not be maintained against the company for injuries received by the passenger in jumping from a train in motion, such damages being the result solely of the passenger's imprudence.—Q. B.—*Central Vermont Railway & Lareau*, 30 L. C. J., p. 231, M. L. R., 2 Q. B., 258.—GILL, J.—M. L. R., 1 S.C., p. 433.

7. That a Company engaged in the conveyance of passengers, is responsible for injuries sustained by a passenger while being carried in the Company's vehicle, unless it be proved by the Company, that it was impossible for them to prevent the accident.—Q. B.—*Montreal City Passenger Railway Company & Irwin*, M. L. R., 2 Q. B., p. 208. (See also cases nn. 22, 52 and 58 *supra*.)

8. A person was run over by an engine whilst crossing the railway track on a public highway. No whistle having been blown and no bell rung, the Company was held liable in damages.—Q. B.—*Wilson & Grand Trunk Railway Company*, 2 Q. B. R., p. 131.

9. That no presumption of fault lies against a Railway Company from the fact that a person is injured on its track; on the contrary, it is for the person injured to show that he had a lawful right to be there; and to enable him to claim damage, he must also show that the Company were guilty of some fault, neglect or imprudence whereby the injury was caused. So, where the Plaintiff was injured by a train at a street crossing, and it appeared that there was a sign-board, indicating the crossing, and that the bell was rung and the whistle sounded to warn passers of the approaching train, it was held that he could not recover damages.—Q. B.—*Roy & Grand Trunk Railway Company*, M. L. R., 1 Q. B., p. 353, 4 L. N., p 211.

10. Qu'une compagnie de chemin de fer est responsable d'un accident arrivé à la traverse d'un chemin public, même si elle a pris toutes les précautions expressément exigées par l'acte des chemins de fer, si elle n'a pas, en outre, pris toutes les précautions additionnelles que la nature exceptionnellement dangereuse de la traverse exigeait, et que le fait d'avoir mis un gardien à la traverse est, de la part de la compagnie du chemin de fer, une admission que telle traverse est exceptionnellement dangereuse, et la suppression de ce gardien constitue alors une présomption de négligence.—Q. B.—*Compagnie du Grand Tronc & Godbout*, 6 Q. L. R., p. 63.

Digitized by Google

RAILWAY ACCIDENTS, (*Continued*):—

11. Lorsque des dommages ont été causés par le quasi-délit du défendeur, et qu'il y a eu faute de part et d'autre, la cour devra rechercher la cause principale et immédiate de l'accident et condamner son auteur à payer les dommages soufferts par l'autre partie.—Q. B.—*Canadian Pacific Ry. Co. & Cadieux*, M. L. R., 3 Q. B., p. 315.

Injuries to cattle : — 12. Where by the charter of a Railway Company, they are not bound to erect barriers at those points where the line crosses the public road, they are not answerable for injury done to cattle straying on the line from the public road; but that parties allowing their cattle so to stray are answerable to the Railway Company for damage done to cars thrown off the track by collision with such cattle.—BRUNEAU, J.—*Rocheleau vs St. Lawrence & Atlantic Ry.*, 2 L. C. R., p. 337.

13. Railway Company held not liable for animals killed, the accident having occurred when the fences were down during the winter.—Q. B.—*Montreal & Champlain Ry Co. & Perras*, 2 L. C. L. J., p. 17.

14. That a Railway Company is not responsible for the killing of animals straying and trespassing on its track.—That when a proprietor allows a road across his land, and the gate opening from it to the track, to be used by the public as a thoroughfare, he will be responsible for the acts of the persons using the road; and the Railway Company will not be held responsible for the bad condition of the gate and for the killing of animals passing through it on to the track.—BÉLANGER, J.—*Jasmin vs Canadian Pacific Ry. Co.*, 6 L. N., p. 163.

15. Que les compagnies de chemins de fer sont tenues de faire et entretenir à leurs frais, des clôtures de chaque côté du chemin de fer, de la même hauteur et force que les clôtures de division ordinaire, à défaut de quoi, elles sont responsables des dommages causés par leurs trains ou locomotives, aux animaux sur leurs chemins de fer.—Qu'une clôture composée seulement de quatre fils de fer barbé, et n'ayant en tout que 3½ pieds de hauteur, avec des piquets distants l'un de l'autre de 12 à 14 pieds, est insuffisante.—CIMON, J.—*Landry vs Compagnie du Chemin de Fer du Nord*, 9 L. N., p. 5.

16. That section 13 of the Railway Act respecting the responsibility of a Railway Company for damage done to cattle through neglect of the Company to fence its line, only applies to proprietors owning property abbutting on or crossed by the railway line whose cattle are injured through the neglect to fence in conformity with the law. That in such a case a Railway Company is only responsible for damage done to cattle on its railway by its trains or engines and is not liable for accidents happening on another line of railway running parallel and contiguous to its line, even though the fencing of the first line might have prevented the accident. The damages contemplated by this section are actual damages and the expense and trouble that a proprietor of cattle incurs in herding his cattle before the accident, to prevent their escaping on to the railway line, on account of absence of fences, is not a damage that can be recovered from the Railway Company in a case such as the present.—DOHERTY, J.—*Fouchon vs Quebec Ry. Co.*, 11 L. N., p. 74.

Damages by fire:—17. Que les compagnies de chemins de fer sont responsables des dommages causés par le feu qui s'échappe de leurs locomotives, même dans le cas où elles avaient pris, pour prévenir les incendies, toutes les pré-

Digitized by Google

RAILWAY ACCIDENTS, (*Continued*) :—

cautions prescrites par la loi et recommandées par la science.—Q. B.—*Grand Trunk Railway Co. & Meegan*, 4 Q. B. R., p. 228, M. L. R., 1 Q. B., p. 364.

18. Qu'une compagnie de chemin de fer est responsable des dommages d'un incendie, causé par des étincelles échappées de la cheminée d'une de ses locomotives, lorsque, par la fermeture de "l'étouffoir," l'émission des étincelles aurait pu être prévenue.—Q. B.—*Dussault & Compagnie du Chemin de fer du Nord*, 14 R. L., p. 207, 12 Q. L. R., p. 50.

19. Qu'une compagnie de chemin de fer est responsable des dommages qu'elle cause, lorsque les étincelles qui sortent d'une des locomotives qu'elle emploie pour faire tirer ses wagons, mettent le feu à un batiment près duquel elle passe et, cela quand même la compagnie aurait pris toutes les mesures de garantie fournies par la science actuelle. — MATHIEU, J.—*Jodoin vs Compagnie du Chemin de fer du Sud-Est*, M. L. R., 1 S. C. p. 316.

20. The burning of lumber placed on the property of a Railway Company close to their track, without any permission, expressed or implied, gives the owner no right of action against the Company.—C. R.—*Goodhue vs Grand Trunk Ry. Co.*, M. L. R., 3 S. C., p. 114.

21. Qu'une compagnie de chemin de fer a le droit d'arrêter ses chars sur aucune partie de sa voie, et qu'en laissant échapper la vapeur qui s'accumule dans la bouilloire d'une locomotive, elle ne fait qu'user d'un droit légitime, et n'est pas responsable en dommage, parce qu'un cheval aurait été effrayé et se serait blessé ; le propriétaire du cheval étant tenu de le surveiller de manière à ce qu'il ne s'emporte pas.—Q. B.—*Canadian Pacific Ry. Co. & Chateauvert*, 16 R. L., p. 28.

Street Accidents :—22. An action for damages will not lie, where the injuryis the result of pure accident, and where no negligence can be imputed to the defendants.—Q. B.—*Montreal City Pass. Ry. & Bignon*, 2 L. C. L. J., p. 21. (See also cases n. 7 *ante* ; 52 and 58 *supra*).

23. The plaintiff sustained damage through the bad state of a temporary road used during the obstruction of the turnpike road by works over which the trustees of the road had no control.—*Held*, that the trustees having collected toll from the plaintiff were directly liable to him.—Q. B.—*Montreal Turnpike Road & Daoust*, 1 L. N., p. 506.

24. The plaintiff, a carter, went to load wood at a wharf, in the port of Montreal, where a steamer was in the act of mooring, and a cable having snapped the plaintiff was seriously injured by the recoil. There was evidence that the plaintiff was aware of the danger.—*Held*, that there was contributory negligence on his part, and he could not recover damages.—Q. B.—*Periam & Dompierre*, 1 L. N., p. 5.

25. For injuries sustained in a street encumbered with building materials, an action of damages lies directly against the corporation of the city, in which such street is situated, irrespective of the negligence of the contractors.—BERTHELOT, J.—*Humphries vs Corporation of Montreal*, 9 L. C. J., p. 75.

26. Une corporation municipale est tenue d'indemniser pour tous les dommages résultant du mauvais état de ses chemins.—POLETTE, J.—*Gaudet vs Corporation du Township de Chester-Ouest*, 1 R. L., p. 75.

Digitized by Google

STREET ACCIDENTS, (*Continued*) :—

27. The corporation of a city is liable in damages for an accident which occured in consequence of part of a street being encumbered with building materials to more than half its extent, and not protected by a light at night—C. R.—*Humphries vs Corporation of Montreal*, 1 L. C. L. J., p. 65.

28. Une personne qui, par curiosité, assiste à un incendie et qui y reçoit une blessure grave par un cheval que les pompiers ont laissé sans gardien, a une action en dommages contre la corporation à qui ce cheval appartient.—MACKAY, J.—*Guimond vs Corporation de Montréal*, 4 R. L., p. 285.

29. A corporation is not responsible for the negligence of others in leaving obstructions in the street, when it appears that the driver might have avoided the obstructions.—MONDELET, J.—*Maguire vs Corporation of Montreal*, 1 R. C. p. 475.

30. The plaintiff's wife proceeding over a market place in the City of Quebec, stepped on a plank, forming part of the planking of the market, which broke and struck her in the face, inflicting injuries for which the present action was brought. It appeared that the clerk in charge walked over the market every day, generally several times, to verify its condition, and no apparent defect existed at the place in question, but an after examination shewed the plank to have been decayed from underneath.—*Held*, that the defect complained of was a latent defect due to the silent, unobservable effect of time and circumstances of which the defendants had no notice, actual or constructive; the occurrence was plainly an accident for which the defendants were not liable, no negligence having been proved against them, and the action could not be maintained.—STUART, J.—*Kelly vs Corporation of Quebec*, 3 Q. L. R., p. 379.

31. The Corporation of Montreal is liable for damages caused by the bad state of one of the public footpaths in the city.—Q. B.—*Grenier & City of Montreal*, 21 L. C. J., p. 296.

32. A municipal corporation is responsible for the condition of its sidewalks and streets, without proof that it had notice of the defects which led to the accident.—C. R.—*Beauchemin vs Corporation de la Ville de St Jean*, 6 L. N., p. 357.

33. Que la corporation de la Cité de Montréal est responsable des dommages occasionnés à une personne et résultant d'une chute que cette personne a faite sur un trottoir en mauvais ordre.—C. R.—*Jodoin vs Cité de Montréal*, 11 R. L., p. 434.

34. Que l'acte 29 Vict., cap. 57, s. 33 n. 8, en mettant, du premier novembre au premier mai, l'entretien des rues dans la Cité de Québec, à la charge des propriétaires riverains, ne permet que contre ceux-ci le recours des personnes auxquelles le mauvais état a causé des dommages.—CASAULT, J.—*Gallagher vs Corporation de Québec*, 11 Q. L. R., p. 32.

35. Que la corporation de la Cité de Québec ayant en vertu du statut 29 Vict. cap. 57, le contrôle absolu des trottoirs dans la Cité de Québec, elle n'a pas de recours en garantie contre le propriétaire, pour dommages résultant d'un accident arrivé par suite du mauvais état de son trottoir.—Q. B.—*Corporation de Québec & Langlois*, 10 Q. L. R., p. 79.

36. The corporation of Montreal is liable for damages caused by the bad state of the public footpaths in the City, and the corporation has a recourse *en garantie* for such damages against the proprietor of the premises opposite the footpath.—JOHNSON, J.—*Guillaume vs City of Montreal*, 3 L. N., p. 406.

Digitized by Google

STREET ACCIDENTS, (*Continued*) :—

37. Plaintiff having injured himself by striking his foot against a lump of snow or ice on the sidewalk, and falling with great violence to the ground, fracturing his thigh, the court awarded $2,000 damages against the City. — TASCHEREAU, J.—*Dillon vs City of Montreal*, 4 L. N., p. 300.

38. Where it was proved that the sidewalk was usually kept in excellent condition, and that the influence of the weather at the time of the accident, was specially unfavorable, the action of a person who slipped and sustained injury, was dismissed.—TORRANCE, J.—*Lutham vs City of Montreal*, 6 L. N., p. 93.

39. Que les appelants, propriétaires d'une église dont le toit est construit de manière à laisser tomber dans la rue la neige qui s'y est accumulée, sont responsables des accidents causés par la chute de cette neige, quand ils n'ont pas prouvé force majeure.—Q. B.—*Dawson & Trestler*, 2 Q. B. R., p. 115, 5 L. N., p. 114.—C. R.—3 L. N., p. 76.—TORRANCE, J.—2 L. N., p. 344.

40. Que, d'après la loi et les règlements de la Cité de Montréal, un propriétaire ne peut être poursuivi pour ne pas avoir enlevé la neige ou la glace des trottoirs situés en face d'une maison, d'une bâtisse ou d'un lot lui appartenant, que lorsque ce propriétaire occupe lui-même cette maison ou bâtisse, ou lorsqu'il s'agit d'un lot vacant.—TASCHEREAU, J.—*City of Montreal vs Beaudry*, M. L. R., 1 S. C., p. 467.

41. Que le réglement de la Cité de Québec pour l'enlèvement de la neige, n'oblige pas l'usufruitier.—E. A. DERY, RECORDER.—*Corporation of Quebec vs Venner*, 9 Q. L. R., p. 247.

42. That a municipal corporation is not bound to make extraordinary exertions, out of proportions to the means at its disposal, in order to keep the streets free from ice and snow, but only to such extent as is reasonable, taking into consideration the means at its disposal.—Q. B.—*Corporation of the City of Sherbrooke & Short*, M. L. R., 3 Q. B., p. 50.

43. Que le propriétaire d'un quai, non ouvert au public, n'est pas responsable en dommages, de l'accident, même mortel, causé à un enfant qui avait mis pied sur tel quai, dont l'état était très défectueux.—Q. B.—*Lord & Compagnie du Chemin de fer du Nord*, 14 R. L., p. 297.

44. A proprietor of real estate in Montreal is responsible for an accident arising from neglect to cover and put a railing around an excavation in the public street, connected with the making of a drain from his property to the public drain, and to put up a light at the spot, notwithstanding that such excavation was made by a contractor over whom the proprietor had no control.—PAPINEAU, J.—*McRobie vs Shuter*, 25 L. C. J., p. 103.

45. Que le fait de la part de la corporation de Québec, de laisser ouverte à la circulation l'espace environnant l'ouverture d'un passage souterrain, sans protéger le public au moyen d'une balustrade ou autrement, constitue une négligence et une faute, et qu'en conséquence elle est responsable en dommages.—C. R.—*Brault vs Corporation de Québec*, 10 Q. L. R., p. 291.

46. That the City of Montreal is liable for damages caused to a horse and vehicle, by the wheel having sunk into the earth upon a public street, where an excavation for a tunnel had recently been filled in, notwithstanding the fact that there was a flaw in the wheel of the vehicle unknown to its owner, it having been proved that the wheel was sufficient for ordinary purposes, but not strong

Digitized by Google

STREET ACCIDENTS, (*Continued*) :—

enough to withstand the strain put upon it by sinking into the earth.—C. R.—*Archambault vs City of Montreal*, 25 L. C. J., p. 225.

47. Que lorsqu'une personne est morte par suite d'un accident causé par le mauvais état des rues, les enfants et héritiers de cette personne, lors même qu'ils n'auraient prouvé aucun dommage, ont droit d'obtenir de la Cité une certaine somme d'argent par forme de consolation et soulagement.—PAPINEAU, J.—*Labelle vs Cité de Montréal*, M. L. R., 2 S. C., p. 56.

Confirmed in Appeal.—Q. B.—*City of Montreal & Labelle*, 15 R. L., p. 474.

48. Poursuite intentée, pour recouvrer des dommages causés par le mauvais état des chemins, et en même temps pour pénalité. *Jugé*:—Qu'un chemin d'hiver doit avoir sept pieds de largeur.—Q. B.—*Corporation de la Paroisse de Saint-Christophe d'Arthabaska & Beaudet*, 10 R. L., p. 591.

49. Qu'une corporation municipale est responsable des dommages causés par suite du mauvais état des rues, sans qu'il soit nécessaire de prouver que la Corporation a été notifiée du mauvais état de ces rues.—Q. B.—*Kelly & Corporation de la Cité de Québec*, 10 R. L., p. 605.

50. Que dans une action en dommages contre une corporation municipale pour réclamer des dommages résultant d'un accident causé par le mauvais état des chemins, la Cour, pour l'évaluation des dommages, prendra en considération la difficulté de maintenir les chemins en bon ordre à cause du mauvais temps et de la saison de l'année.—Q. B.—*Corporation du Canton de Douglass & Maher*, 14 R. L., p. 45.

51. Que lorsqu'un chemin est en aussi bon état qu'il est possible de le maintenir, à raison de la saison et du voiturage qui s'y fait, et qu'il paraît même meilleur que les autres chemins et meilleur qu'il n'avait été les années précédentes, la Corporation ne sera pas responsable des dommages soufferts et causés par le mauvais état de ce chemin.—Q. B.—*Beaucage & Corporation de la Paroisse de Deschambault*, 14 R. L., p. 655.

52. Where an accident occurred on the track of the Montreal City Passenger Railway Company, and it was proved that the rail was laid as required by the charter of the company, and that the roadway at the time of the accident was in good order, it was held, the plaintiff could not recover for the accident, which was caused by the wheel of his vehicle catching on the raised part of the rail.—Q. B.—*Montreal City Passenger Railway Co. & Parker*, 7 L. N., p. 194.

52 *a*. The Defendants were held liable for the damages caused to Plaintiff from an accident to his horse and sleigh by reason of the uneven road bed, arising from the railway track of the Defendants having been cleared of snow to allow of their cars being run on the rails.—TORRANCE, J.—3 L. N., p. 229. (See also cases nn. 7 and 22 *ante* and 58 *supra*.)

53. A line of Railway running alongside of a street, and not divided by any fence from the street, is not a road on which foot passengers using it are entitled to the same protection as if they were walking on an ordinary highway; and so, it was held, that a person who was injured by falling over some planks lying on the track, had no action against the company to recover damages.—Q. B.—*Faucher & North Shore Railway Co.*, 9 L. N., p. 75, 12 Q. L. R., p. 88.

54. That a corporation using the ruins of burned houses to repair a road will be responsible for the loss of a horse caused by his treading on a nail that

Digitized by Google

STREET ACCIDENTS, (*Continued*):—

was among such ruins.—McCORD, J.—*Bernier vs Corporation of Quebec*, 11 Q. L. R., p. 70.

55. That any action against the corporation of a city or town for damages arising from their neglect or default to keep in repair any of its roads, streets or highways, must be brought within three months after such damages have been sustained and that thereafter such action is absolutely barred and prescribed in virtue of sec 4, ch. 85, C. S. C. In the present case the action was dismissed without costs, inasmuch as the defendants ought to have taken advantage of the limitation of the plaintiff's right of action without taking issue on the facts and merits of the demand.—Q. B.—*Corporation of Quebec & Howe*, 13 Q. L. R. p. 315.

56. Que l'entrepreneur des travaux d'une route réglementée par un procès-verbal homologué par un bureau de délégués, lesquels travaux sont mis sous le contrôle d'une municipalité locale et d'un inspecteur de voirie de cette municipalité est garant vis-à-vis cet inspecteur de voirie des dommages résultant de l'inexécution des travaux d'entretien de cette route.—CHARLAND, J.—*Godin & Martin*, 16 R. L., p. 86.

57. The plaintiff sued the defendants to recover damages for injuries sustained through the practice of children coasting or sliding on a street of the town with, as was shown, the approval of the defendants. The court of *première instance* dismissed the action on the ground that a corporation is not liable for the acts of third persons which it cannot control; but the Court of Review held that, although this principle was correct, it could not be applied to the facts of the present case, inasmuch as the corporation defendants could control or did undertake to control the nuisance complained of, but in the wrong direction, by encouraging and approving instead of stopping the same.—C. R.—*Beaufort vs Corporation of Coaticook*, 32 L. C. J., p. 118.

58. A tramway company is, in the enjoyment and exercise of its franchise bound to recognize the rights and necessities of public traffic. Its employees are bound to exercise not only ordinary, but special care in the discharge of their duties. And so, where a carter was taking a load of boxes, his horse and truck standing crosswise upon the street, and the horse, alarmed or struck by a passing tramway car, the conductor of which was not at the time keeping a vigilant watch to avoid accidents, suddenly backed and broke a plate glass window, the tramway car company was held responsible.—DAVIDSON, J.—*Ramsay vs Montreal Street Ry. Co.*, 11 L. N., p. 2, 32 L. C. J., p. 52.

59. Where a reaping machine was being driven by the defendant along the highway, the knife to the right side of the road, and the plaintiff's colt, which was straying upon the road, ran upon the machine, notwithstanding defendant's efforts to keep it off, it was held that the plaintiff was not entitled to recover the loss.—C. R.—*Carr vs Black*, M. L. R., 3 S. C., p. 350.

60. Where the proprietor of a building which had been burned, allowed a road to remain standing after the fire in a dangerous condition, and the wall was blown over by a strong wind which arose subsequently, thereby injuring the neighbour's property, there is a presumption of carelessness and want of prudence such as to render the proprietor of the burned house liable for the damages so caused.—LORANGER, J.—*Alexander vs Hutchinson*, M. L. R., 3 S. C., p. 283.

Digitized by Google

Marine Accidents :—61. Where a collision occurs without blame being imputable to either party, the misfortune must be borne by the party on whom it happens to alight. The practice of the Court is not to give costs on either side where a collision has occurred through in evitable accident.—VICE ADMIRALTY COURT :— BLACK, J.—" *The Margaret*," 10 L. C. R., p. 113.

62. Where a vessel at anchor is run down by another vessel, the vessel under weigh is bound to show by clear and indisputable evidence that the accident did not arise from any fault or negligence on her part. Neither by the marine nor the common law is a vessel or a carriage justified in not taking proper precautions against collision with another by the fact that such other is not in its proper position or side of the road or is in any way contravening any rule of the sea or of the road.—VICE ADMIRALTY COURT :—BLACK J.—" *The Martha Sophia*," 10 L. C. R., p. 1.

63. Que le propriétaire d'un vaisseau sombré, qui obstrue la navigation, est responsable des dommages que peut causer son heurt, s'il n'y maintient pas des indications qui puissent, le jour et la nuit, faire connaître sa position.—C. R.—*Baker vs Freeman*, 10 Q. L. R., p. 368.

64. Que les propriétaires de quais, dans le hâvre de Québec, ne sont pas responsables des dommages causés à un vaisseau par un obstacle qui n'est pas leur fait et qui n'est pas sur leur propriété, quoique tout près, sur la propriété voisine. Que les commissaires du hâvre de Québec ne sont pas responsables des dommages causés par une épave ou un débris de vaisseau effondré, qu'ils ne sont pas obligés d'en indiquer l'existence ni la position, et que le vaisseau endommagé par le heurt de l'épave, ou du débris, n'a de recours que contre le propriétaire de ceux-ci, tant que les commissaires du hâvre n'en ont pas pris possession.—C. R.—*Levasseur vs Les Commissaires du Hâvre, etc.*, 13 Q. L. R., p. 245.

65. Where a collision occurs between a vessel at anchor and a ship under weigh, *prima facie* the vessel in motion is at fault and the onus of proof is thrown on her and she is compelled to show that the vessel was improperly anchored and that the improper anchorage rendered the collision inevitable.— IRVINE, J.— *Ross vs "Henry IV"*, 13 Q. L. R., p. 379.

66. A tug has the right to cast off her tow in the case of stress of weather, when the latter is over-running her, and will not be held liable for the subsequent damage incurred by the collision of the tow with another vessel, all the precautions required of a ship under sail not having been taken by the tow.— IRVINE, J.—" *Loyal*" *vs* " *Challenger*", 14 Q. L. R., p. 135.

General Accidents :—67. The mayor and corporation of Montreal are not liable on an action brought by a person, who has been beaten during a riot, to recover damages for bodily injuries received and for loss of wearing apparel on his person at the time.—C. R.—*Drolet vs City of Montreal*, 1 L. C. R., p. 408.

68. A contractor for the erection of a building is liable to a person passing through a public street for damages for injuries sustained by the falling upon him of a beam from such building.—The *onus probandi* is upon the contractor, that such injuries were not caused by negligence. The builder is liable for the acts of his workmen and other persons under his control in and about the building.— Q. B.—*Holmes & McNevin*, 5 L. C. J., p. 271.

69. The defendants are not liable in damages to a person falling into the cellar of a house burned down and not rebuilt, the lot being unenclosed, contrary to

Digitized by Google

GENERAL ACCIDENTS, (*Continued*) :—

the by-law of the corporation, the cause of such damage being too remote.—DAY, J.—*Bélanger vs City of Montreal*, 8 L. C. R., p. 228.

70. Le défendeur dans le but de faire de la terre neuve met le feu à des souches sur sa propriété : un vent violent s'éleva tout à coup et propagea le feu sur la propriété de son voisin, le demandeur.—*Jugé:* Que le défendeur était responsable des dommages causés à la propriété du demandeur, bien que le feu y eût été communiqué par force majeure.—C. R.—*Fordyce vs Kearns*, 1 R. C., p. 120.

71. The occupant of premises who invites persons to enter therein through a passage having a trap-door, is liable in damages to such persons who, ignorant of the trap, fall into it and are injured.—TORRANCE, J.—*Lussier vs Anderson*, 20 L. C. J., p. 279.

72. A person carrying on a trade on his premises, is bound to have the premises in a safe condition for persons and property coming there, by implied invitation, to give him their custom, but he may relieve himself of responsibility by showing that there was contributory negligence on the other side, without which the accident complained of would not have occurred.—JOHNSON, J.—*Allan vs Miller*, 4 L. N., p. 387.

73. Where the respondents left open, at night time, the gate or passage way which lead from the quay and bridge-boat to its steamer, and the steamer not being there, the appellant's husband fell into the river and was drowned, the respondents were rightly held responsible, although the lights required by the City of Quebec by-laws were provided.—Q. B.—*Boulanger & Grand Trunk Railway Company*, 11 Q. L. R., p. 254, 14 R. L., p. 321.

74. The plaintiff was injured in consequence of an empty barrel, thrown from an upper window of the defendant's cotton factory, falling upon him. Damages amounting to $5,000 were awarded to him.—C. R.—*Leroux vs Hudon Cotton Company*, 4 L. N., p. 118.—TORRANCE, J.—4 L. N., p. 46.

75. Que celui qui, pour clôturer son terrain, fait usage de fil de fer barbelé, est responsable des dommages que souffre le propriétaire d'un animal qui s'y blesse, lorsque cette clôture n'est pas bien faite.—PAPINEAU, J.—*Bessette vs Howard*, 8 L. N., p. 170.

76. Where the plaintiff left his horse unattended in a public street, and the defendant was carting iron on that street, thereby causing a noise which startled the plaintiff's horse and caused it to bolt and to do damage, it was held that no action would lie against the defendant.—JOHNSON, J.—*McWillie vs Goudron*, 30 L. C. J., p. 44.

For accidents caused by horses running away &c., see cases noted at C.C.1055.

Libels by Newspapers :—77. Newspaper proprietors are liable in damages to an unmarried woman for inserting in their paper a notice sent to them of the birth of children of the Plaintiff, describing her as the wife of a person named, although there is no evidence of malice or of knowledge on the part of the Defendant that the notice was untrue and although an apology, not communicated to the Plaintiff, was made and reward offered for the discovery of the party sending such notice.—C. R.—*Starnes vs Kinnear*, 6 L. C. R., p. 410.

78. The Defendant wrote a letter to the newspapers and otherwise published statements accusing some accountants, employed by the executors of the will of

Digitized by Google

LIBELS BY NEWSPAPERS, (*Continued*):—

the late Hugh Fraser, of having produced a fraudulent and false balance sheet, &c. Damages of $50 were awarded.—C. R.—*Evans vs Fraser*, 4 L. N., p. 51.

79. That in an action of damages for malicious libel, the truth of the matter charged as libel may be alleged in mitigation of damages, when the intention to injure is negatived by the plea.—Q. B.—*Graham & McLeish*, 3 Q. B. R., p. 225.

80. Que publier faussement dans une gazette, pendant une lutte électorale, qu'un des candidats n'a pas payé ses dettes à des élections précédentes, dans une autre division, et ne s'y présente pas pour cette raison, est une injure grave qui donne à ce candidat un recours civil et droit à des dommages ($50 avec dépens.) —CASAULT, J.—*Belleau vs Mercier*, 8 Q. L. R., p. 312.

81. Qu'il est permis à un journal de publier des accusations qui autrement constitueraient un libelle, mais à condition qu'elles soient portées dans un intérêt public et qu'elles soient vraies, et si la vérité n'est pas prouvée, le plaidoyer, qui l'allègue, aggrave la responsabilité du défendeur. Que si, en ce cas, l'imprimeur du journal plaide et prouve sa bonne foi, et fait des excuses au demandeur, cela doit faire mitiger en sa faveur sa condamnation.—CARON, J.—*Langelier vs Brousseau*, 6 Q. L. R., p. 198.

82. The Defendants published, in their newspaper, a charge of improper conduct towards a lady against a person, describing him as an advocate, and in such a manner as to allow his identity to be perceived, and, not having justified their plea of truth and public interest, they were held liable in $50 damages.—LORANGER, J.—*Desrosiers vs Lessard*, 7 L. N., p. 303.

83. Where the Defendant, an elector, published a letter stating that the Plaintiff, a member of the Montreal Board of Health, was "a cipher" the jury returned a verdict for the Defendant.—JOHNSON, J.—*Tansey vs Graham*, 10 L. N., p. 139.

84. A fair and honest report in a newspaper of proceedings before a Court of Justice, whether condensed or not, and even if injurious to persons referred to therein, is privileged. The defence of justification is strengthened by evidence showing that the plaintiff's character was such that he suffered no damage by the publication.—DAVIDSON, J.—*Downie vs Graham*, M. L. R., 3 S. C., p. 333.

85. Que la publication par un journal de l'article suivant: "Heureusement "que les voyous qui ont crié et hurlé n'étaient pas les électeurs du comté. Les "rouges avaient fait monter là une cinquantaine de repris de justice, à la tête "desquels se distinguait un charretier du nom de Sabourin qui a déjà purgé une "sentence de six mois à la prison commune de Montréal pour parjure. C'est à "ces gibiers que les honnêtes gens doivent de n'avoir pas pu entendre paisi- "blement la discussion hier soir," constitue un libelle, pour lequel le journal a été condamné à $50 de dommages et dépens d'une action de $100.—WURTELE, J.—*Sabourin vs La Cie d'Imprimerie et de Publication du Canada*, M. L. R., 3 S. C., p. 253.

86. Although the publication in the public interest of the proceedings of a municipal council are privileged, yet the altercations between the members of such council, if reported, are published at the risk of the newspaper which does so. In the present case, however, the facts proved are such as to warrant the dismissal of the action by the inferior court.—Q. B.—*Donovan & Herald Co.*, M. L. R., 4 Q. B., p. 41, 32 L. J. C., p. 11.

Digitized by Google

LIBELS BY NEWSPAPERS, (*Continued*) :—

87. Dans une action en dommage pour libelle, la rétractation ne suffit pas si elle est faite après l'institution de l'action et si le plaidoyer n'offre pas les frais. La reproduction des nouvelles à sensation, par exemple les rapports de cour de police, se fait aux risques et périls de ceux qui exploitent ce genre d'affaires ; ils doivent être tenus responsables de l'imprudence légère.—C. R.—*Pope vs Post Printing and Publishing Co*, 32 L. J. C., p. 50.

88. Qu'un journal ne peut plaider la vérité des imputations contenues dans un prétendu libelle comme justification de sa publication, et que tel plaidoyer à une action en dommage peut être renvoyé sur réponse en droit.—Qu'un employé public est responsable de sa conduite à l'autorité compétente et qu'un journal n'a aucun droit, en l'absence d'une mission spéciale, d'informer le public de sa conduite.—MATHIEU, J.—*Daoust vs Graham*, M. L. R., 4 S. C., p. 49.

But it was held in the Court of Queen's Bench as follows:

Que les actes de tout officier public sont sujets à une juste et légitime critique de la part de la presse et du public en général. Que la destitution d'un officier public est un sujet d'intérêt général que le public a intérêt de connaître, et que la publication d'une telle destitution et des causes qui l'ont motivée ne peut donner lieu à une réclamation en dommages que dans le cas où, d'après les circonstances, une telle publication aurait été faite par malice et avec l'intention de nuire. Que la vérité et la fausseté des faits est une des circonstances les plus importantes pour déterminer si l'auteur responsable de l'écrit prétendu libelleux a agi avec malice et dans l'intention de nuire.—Q. B.—*Graham & Daoust*, 32 L. C. J., p. 181.

89. That a public announcement of the termination of an agency, concluding with the following expressions: "Je tiens à en donner connaissance au public " afin qu'il ne soit pas mis sous de fausses impressions,"—is injurious and constitutes a valid ground for an action of libel.—C. R.—*Demers vs Chapleau*, M. L. R., 4 S. C., p. 66.

90. A newspaper calling a French Canadian, an electoral candidate, a *Freemason*, was held liable in $400 damages.—TORRANCE, J.—*Lareau vs Compagnie d'Imprimerie de la Minerve*, 27 L. C. J., p. 336, 9 L. N., p. 156.

Libel and Slander ; Privileged Communications : — 91. The contents of a confidential letter is not the subject of an *action d'injure*.—K. B.—*Smith vs Binet*, 1 R. de L., p. 504.

92. Qu'une lettre privée écrite à un particulier et qui lui est envoyée sans lui donner aucune publicité, est une communication privilégiée qui ne peut donner droit à une action en dommages.—JETTÉ, J.—*Burnstein vs Davis*, M. L. R., 1 S. C., p. 67.

93. That a letter written, in good faith and without malice, by the lessor of premises occupied by a manufacturing company of which the plaintiff was manager and addressed to one of the directors and principal shareholders, charging the manager with inefficient administration, the writer at the time having reason to be anxious respecting his interests as landlord of the company, is a privileged communication.—C. R.—*Macfarlane vs Joyce*, M. L. R., 3 S.C. p. 326, 32 L.C. J,. p. 25.

94. An advocate in a case who charges a witness under examination in the case with being a perjurer and a liar, is not amenable to a civil suit in damages

Digitized by Google

LIBEL AND SLANDER.—PRIVILEGED COMMUNICATIONS, (*Continued*).

for making such accusations, when he does so without malice and under the instructions of his client.—JETTÉ, J.—*Gauthier vs St Pierre*, M. L. R., 1 S. C., p. 52.

95. Where the Defendant, a tax-payer and a father, opposed before the President of the Board of School Commissioners, the appointment of the Defendant, a Brother of the Order of Christian Schools, as a teacher, and urged the immoral and improper conduct of the Defendant in support of his objections, it was held, under the circumstances of the case, that the communication was justifiable and privileged.—GILL, J.—*Elie dit Lebreton vs Elie*, 31 L. C. J., p. 54.

96. That while the conduct of a member of parliament, in his public capacity, is open to criticism, and an action is not maintainable for an imputation which arises fairly and legitimately out of his conduct, yet an imputation, unsupported by evidence, of dishonest motives in voting upon a question and of selling his influence, is unjustifiable and an action based upon such accusation will be maintained. (Judgment for $250 damages.)—C. R.—*Champagne vs Beauchamp*, M. L. R., 2 S. C., p. 484, 14 R. L., p. 675.

97 *a*. The deputy head of a public office, before leaving for a vacation handed the keys of the safe to a supernumerary instead of entrusting them to H the officer next after him. Upon being asked by his chief, why he did this, he answered "I have no confidence in him," meaning H. Hence action for slander. *Held ;* That the words spoken constituted a privileged communication and that in order to succeed in an action upon these words, it would be necessary to prove express malice.—ANDREWS, J.—*Hamel vs Amyot*, 14 Q. L. R., p. 56.

98. Que l'action pour dommages résultant d'allégués diffamatoires faits dans une défense, peut être intentée avant que la cause dans laquelle cette défense a été produite, soit terminée. Que les pièces de procédures contenant des allégations diffamatoires contre l'une des parties dans la cause, ne sont privilégiées que lorsqu'elles portent sur des faits pertinents, et qu'elles ont été produites de bonne foi dans un but de défense légitime.—LORANGER J.—*Hodgson vs Hochelaga Bank*, M. L. R., 1 S. C., p. 15.

99. That a libel in a plea gives good ground for an action of damages.—C. R.—*Laflamme vs Mail Printing and Publishing Company*, 30 L. C. J., p. 87. (Confirmed in Appeal.)

100. Celui qui diffame une des parties par des écritures au dossier, sans cause probable, sera passible de dommages.—Q. B.—*Pacaud & Price*, 15 L. C. J., p. 281. (See also case n. 111 *supra*.)

Libel and Slander.—Miscellaneous :—101. Defamatory words spoken by a Roman Catholic *curé* warning a parishoner not to employ an advocate in his professional capacity, are actionable.—Q. B.—*Brossoit & Turcotte*, 20 L. C. J., p. 141.

102. On the 14th April 1868, S. and two others, B. and M., were named joint commissioners to name the amount which should be accorded for expropriation of property required for widening one of the streets in the City of Montreal. —On the 7th August, 1868, the Appellants, in consequence of an award made by S., in reference to said property, passed a resolution charging him with fraud and partiality, and an application was made on their behalf to the Superior Court to have him removed from the office of commissioner.—On the 17th Sep-

Digitized by Google

LIBEL AND SLANDER :—MISCELLANEOUS, (*Continued*) :—

tember, 1870, the conclusions of the petition were granted, on the ground that the commissioners had committed an error of judgment in the execution of their duty as commissioners, proceeded on a wrong principle in estimating the amount payable for the expropriation. The charges of fraud and partiality were held unfounded.—On the 20th September 1873, the Court of Queen's Bench for Lower Canada (Appeal side) re-instated the said S. and B., in their position as commissioners.—On the 4th November, 1876, this judgment was confirmed by the Privy Council.—In May 1871, S. brought an action against the Defendants for damages which he alleged he had suffered in consequence of his having been unjustly removed by the Appellants from the position of commissioner. The Respondents, widow and daughters of the late S., became Plaintiffs *par reprise d'instance*. —HELD: That the action was not an action merely for the libel contained in the resolution of the 7th August, 1868, but for a malicious prosecution in following up that resolution by proceedings instituted in the Courts, maliciously and without any just cause, and, confirming the judgment of the Court of Queen's Bench, $3,000 damages were allowed.—SUPREME COURT.—*City of Montreal & Dame Hall*, 12 S. C. R., p. 74. C. D., p. 284.—Q. B.—27 L. C. J., p. 129.

103. B. S. and M. were appointed commissioners to assess the amount that should be allowed W. whose property was being expropriated by C. The award of B. and S. was fixed at $19,500 but subsequently increased to $13,666, M. estimating the amount at $7,500. C. passed a resolution that B. and S. be removed, on the ground that their award was excessive and that they had been influenced by an improper consideration, namely, their intimacy with W., in making it. The petition was granted and B. and S., were removed, but were re-instated on an appeal in which the judgment granting the petition was reversed and which appeal was affirmed by the Privy Council. B. and S. thereupon brought actions of damages against C. *Held*:—That the petition of C. was libellous and that substantial damages must be allowed the plaintiff for the injury suffered.—TASCHEREAU, J.—*Brown vs City of Montreal*, 31 L. C. J., p. 138.

104. The defendants were the School Commissioners of St. Phillipe and the plaintiff was their President. The plaintiff made certain untrue representations, on the strength of which a new school district was erected. Complaints followed this action, and investigation showed that the school district was unnecessary, whereupon the defendants passed a resolution declaring that the plaintiff gave this untrue information, falsely, maliciously and fraudulently, with a view to gain his own private ends, which resolution was to be shown, for public purposes, to the Superintendent of Education. The plaintiff complained of this resolution, whereupon the defendants passed another, declaring that the first resolution was not intended to attack the plaintiff's character, honour and reputation and that the injurious expressions therein contained had been inserted through inadvertence. They also offered $40 as reparation therefore. The plaintiff sued for damages and the Superior Court (Mathieu, J.) awarded $200. The Court of Appeal, reversing this judgment, declared the $40 offered to be sufficient, but made each party pay their own costs in appeal.—Q. B.—*Lefebvre & Monette*, 32 L. C. J., p. 195.

105. That persons carrying on a mercantile agency are responsible for the damage caused to a person in business by an incorrect report concerning his

Digitized by Google

LIBEL AND SLANDER :—MISCELLANEOUS, (*Continued*) :—

standing, though the report be only communicated confidentially to a subscriber to the agency on his application for information.—WURTELE, J.—*Cossette vs Dunn*, M. L. R., 3 S. C., p. 345.

106. That when the report of a mercantile agency to its customers concerning the standing of a person in business, is true, and no malice is proved, an action of damages for such publication will not be maintained.—Q. B.—*Girard & Bradstreet*, M. L. R., 3 Q. B., p. 69.

107. When the appellant, a mercantile agency, sent a circular to its subscribers with the words "call at office" in reference to the respondent, a dry goods merchant of Montreal, and amongst those who called at the office was a newspaper correspondent, not a subscriber, who was informed by the appellant's employees that the respondent's firm had applied for an extension of time on a large indebtedness to their English creditors, which information was untrue and based upon a report which the appellant had not verified, and it was proved that this report had injured the respondent's credit and embarrassed him in the management of his business, several orders for goods being cancelled or suspended until the report was shown to be unfounded, it was held the appellant was guilty of negligence in circulating through his employees a report of an injurious nature without verifying it and also in communicating it by circular and verbally to persons who had no interest in being informed of the standing of respondent. The award of $2000 damages made by the Superior Court, was therefore confirmed.—Q. B.—*Bradstreet Co. & Carsley*, M. L. R., 3 Q. B., p. 83, 31 L. C. J., p. 292.

108. When a Telegraph Company transmits over its line a message containing libellous matter, they render themselves responsible for the circulation of a libel. The Company is not obliged, by law to transmit a message over its lines if the message is libellous in its nature.—Q. B.—*Great North Western Telegraph Co. & Lareau*, 30 L. C. J., p. 221.

109. Que dans l'espèce la Compagnie du Télégraphe est responsable du libelle qu'elle a transmis, à la demande de quelqu'un.—Q. B.—*Archambault & Great North Western Telegraph Co.*, 14 Q. L. R., p. 8.

110. An action of damages will lie against a party who has used language or made insinuations which have the effect of injuring the character of the Plaintiff. In the case submitted the Plaintiff was not bound to prove that the imputations made against him were false and he was entitled to a judgment upon the verdict of the jury awarding him damages.—Q. B.—*Bélanger & Papineau*, 6 L.C. R., p. 415.

111. In an action for verbal slander of this nature, the slanderous words themselves are not to be chiefly considered, but the motive and intention of the utterer and the occasion of their utterance.—The truth of the imputation is not the issue, but the rightfulness of the occasion and the integrity of the motive, *bonâ fide*, of its utterance.—If words were spoken *bonâ fide*, is for the court; if *bona fides* existed, is for the jury, and should be so submitted.—Answers of slander to inquire in the interests of the slandered, are privileged communications, and in this case, the answers should have been withdrawn from jury.—Communications made in pursuance of some duty, legal or moral, by the alleged slanderer, or with fair and reasonable purpose of protecting his interest, are privileged and beyond the legal implication of malice.—Implied malice cannot

Digitized by Google

LIBEL AND SLANDER :—MISCELLANEOUS, *Continued*) :—

co-exist with privileged communication, and to support action, affirmative actual malice must be proved and found.—Malice in law is not simply ill will, but means a wrongful act done intentionally with some other than a lawful object, and to gratify passions of slanderer.—In this case, the occasion justified the utterance as privileged communication, which could only be overcome by proof of express malice.—BADGLEY, J.—*Poitevin vs Morgan*, 10 L. C. J., p. 93.

112. One hundred dollars damages were awarded the Plaintiff for being called "*une crasse*," "*une canaille*," "*un maudit voleur*," "*un enfant de putin*," and for having said of her "*que sa mère était une putin.*"—TORRANCE, J.—*Simard vs Marsan*,. 2 L. N., p. 333.

113. Two hundred and fifty dollars damages were awarded the Plaintiff, a marriageable maiden for being called a "*putin.*"—MACKAY, J.—*Denis dit Verroneau vs Théoret*, 5 L. N., p. 163.

114. The Plaintiff was a domestic servant in the employment of the Defendant, and sued him for damages for slander, in falsely stating that she had stolen goods belonging to him. The proof being deficient, the action was dismissed.—JOHNSON, J.—*McDonald vs Ryland*, 5 L. N., p. 291.

115. Qu'un médecin n'a pas le droit de publier dans un compte pour services professionnels, la nature de la maladie pour laquelle il réclame le prix de ses services, lorsque telle publication est de nature à blesser ou injurier son débiteur. —Q. B.—*Hart & Thérien*, 5 Q. L. R., p. 267.

116. Que le fait de dire, en présence de témoins, à un créancier, qu'il avait tort d'avancer à son débiteur, que sa dette était risquée, que ce débiteur ne payait personne et avait déjà fait perdre de l'argent à d'autres créanciers, et d'autres paroles semblables, lorsque cela est dit sans motif légitime, d'une manière non confidentielle, ni privilégiée, donne droit en faveur du débiteur à une action en dommage, et même à des dommages exemplaires.—TASCHEREAU, J. —*Hus vs L'Espérance*, M. L. R., 2 S. C. p. 127.

117. Que quelques griefs qu'un individu puisse avoir contre un autre, il n'est pas justifiable de l'injurier en le qualifiant de voleur ou lui appliquant d'autres termes analogues.—Q. B.—*Garneau & Robitaille*, 16 R. L., p. 79.

118. The plaintiff was awarded $100 damages for having been accused by the defendant, in an election speech during a municipal contest, of having desired to appropriate $400 which had been deposited by a third party in a bank, and of having erased his signature from a title deed.—MATHIEU, J.—*Martineau vs Roy*, 16 R. L., p. 257.

119. The plaintiff in this case obtained $50 damages and costs as in the class of action between $100 and $200, as damages from the defendant caused by his calling her "*une femme à deux maris*" and by his telling people that she frequented houses of ill fame, whereby her business as a grocer, which she was compelled to carry on by reason of the ill health of her husband, was affected. This judgment was confirmed by the Court of Review.—TAIT, J.—*Daigneau vs Lapointe*, 11 L. N., p. 146.

120. Where a mistress, who had discharged a servant, subsequently, at a servant's registry office, told the keeper of the registry office that the said servant was a thief and ought to be in jail, which statement she subsequently retracted, the court of first instance dismissed an action brought by the servant for

Digitized by Google

LIBEL AND SLANDER :—MISCELLANEOUS, (*Continued*) :—

damages, but the higher court awarded $25 and costs as of the highest class of a non-appealable action in the Circuit Court.—Q. B.—*Fitzgibbons & Wooìsey*, 13 Q. L. R., p. 49.

121. Que le défendeur, en réponse à une action pour libelle, peut plaider qu'il n'a causé aucun dommage au demandeur, vû que sa réputation et son caractère étaient si mauvais qu'ils n'ont pu souffrir du libelle, et que cette réputation mauvaise était le résultat de divers crimes et délits commis par le demandeur.—MACKAY, J.—*Baxter vs Fahey*, 12 R. L., p. 7.

122. Damage may be presumed from the publication of a slander to one or more individuals.—C. R.—*Denis vs Theoret*, 27 L. C. J., p. 12.

False Arrests :—123. Les corporations municipales sont responsables des actes illégaux commis par leurs hommes de police.—Q. B.—*Cité de Montréal & Doolan*, 3 R. L. p. 433.

124. A corporation is liable for the damages caused by reason of a false arrest effected by one of its policemen.—C. R.—*Mayor of Montreal & Doolan*, 30 L. C. J., p. 41.

124 *a*. Similar decision.—DOHERTY, J.—*Bruchesi and Village of St Gabriel*, 6 L. N., p. 61.

125. Que la Cité de Montréal est responsable des actes de ses employés faits dans l'exécution de leur charge, ces derniers étant alors censés agir comme agents autorisés de la Cité ; qu'en consequence, elle est responsable des fausses arrestations faites par ces hommes de police.—Que lorsque la Cité de Montréal envoie ses hommes de police garder la paix publique à quelqu'endroit, et qu'elle place ses hommes sous les ordres d'une personne quelconque qui n'est pas à son emploi, cette délégation de pouvoir n'empêche pas sa responsabilité.—JETTÉ J.—*Laviolette vs Thomas*, M. L. R., 1 S. C.. p. 350.

126. That when a corporation is sued for an illegal arrest, by its officer, it is sufficient for the Defendant to show that the officer had probable cause.—Q. B.—*Corporation of Quebec & Piché*, 11 Q. L. R., p. 249.

127. A municipal corporation is not responsible in damages for the arrest of a citizen, without probable cause, made by a police officer in the pay of such corporation but appointed by and under the control of a Board of Commissionners named by a special statute.—Q. B.—*Corporation of Quebec & Olivier*, 14 Q. L. R., p. 154, 15 R. L., p. 319.

128. The Plaintiff having been arrested by the Defendant for obtaining money under false pretences, and after the examination of the facts, discharged by the magistrate, and the charge having been made by the Defendant unjustifiably to coerce the Plaintiff into a settlement of accounts, and without probable cause, damages of $200 were awarded to the Plaintiff.—TORRANCE, J.—*Barthe vs Dagg*, 3 L. N., p. 230.

129. In the present instance, the Plaintiff had been arrested for illegally removing a barrier of a toll-gate, which he claimed he had a right to do. Under the circumstances disclosed, the Court held that he had no right to recover damages for false arrest.—C. R.—*Brais vs Corporation of Longueuil*, 5 L. N., p. 212, 11 R. L., p. 503.

130. The Plaintiff executed a mortgage in favor of the Defendant and on the

Digitized by Google

FALSE ARRESTS, (*Continued*):—

faith of the representation that only one other mortgage existed on the property, the Defendant made advances. The representation was untrue, the property being at the time mortgaged to its full value. The Defendant then caused the Plaintiff to be prosecuted criminally. A true bill was found by the grand jury but the Plaintiff was acquitted by the petit jury, *Held*:—That the Defendant acted with probable cause.—JOHNSON, J.—*Grothé vs Saunders*, 5 L. N., p. 213.—Confirmed in Appeal.—Q. B.—M. L. R., 3 Q. B., p. 208.

131. It is not necessary, in an action for malicious criminal prosecution, to allege that the justices before whom the Plaintiff was brought had jurisdiction, but it is essential to aver that the prosecution complained of has been terminated.—TORRANCE, J.—*Prosser vs Creighton*, 7 L. N., p. 104.

132. In this case, which was an arrest for obtaining money under false pretences, there was not reasonable or probable cause, and the Plaintiff was awarded $75 for damages.—C. R.—*Turcotte vs Brissette dit Courchêne*, 7 L. N., p. 277.

133. Where B., while passing along a street, pushed a drunken man so that he reeled against a shop window and broke it, and the shop-keeper, coming out, caused the arrest of both B. and the drunken man, on the charge of breaking his window, it was held that there was probable cause for the arrest.—TORRANCE, J.—*Barrette vs Turner*, 9 L. N., p. 314.

134. The court awarded $20 damages and costs of an action of less than $100, for false arrest for a theft committed in the house of doubtful reputation, kept by the parties arrested, in which the defendant passed the night.—Q. B.—*Serrurier & Mercier*, 1 Q. B. R., p. 65.

135. Les appelants en cette cause ayant été nommés respectivement tuteurs conjoints et subrogé-tuteur à un enfant mineur, l'intimé et le nommé Charles Asselin présentèrent une requête en destitution de tutelle, et au bas de la requête, signèrent un affidavit que tous les faits y contenus étaient vrais. Les appelants prétendaient que les faits contenus dans la dite requête, qui, du reste, fut renvoyée, n'étaient pas conformes à la vérité, accusèrent l'intimé et l'autre requérant de parjure. L'intimé, ayant été immédiatement renvoyé par le magistrat de Québec, a pris une action en dommages contre les appelants.—*Jugé*: Que les appelants ont agi avec légèreté et sans cause raisonnable, en portant contre l'intimé une accusation de parjure, et n'ont pas le droit de se plaindre du jugement qui les a condamnés à payer $100 de dommages à l'intimé.—Q. B.—*Beautronc dit Major & Lalonde*, 1 Q. B. R., p. 208.

136. That it is sufficient to support an action for malicious prosecution, if the prosecutor (defendant) while complaining that a sum of money entrusted to the accused (plaintiff), a commission merchant, had not been employed according to instructions and that part had been mis-appropriated, endeavoured to compound what he pretended was a felony, by warning the accused to settle to save further trouble, and held back the warrant for nineteen months after laying the information in order to coerce him to settle, though the prosecutor had obtained a legal opinion that it was a case of felony and acted thereon.—Q. B.—*Larocque & Willet*, 23 L. C. J., p. 184.

137. Que celui qui, sans raison et par pure malice, fait arrêter quelqu'un, et le fait emprisonner temporairement, sera condamné à lui payer des dommages. ($50).—Q. B.—*Fraser & Gagnon*, 11 R. L., p. 517.

Digitized by Google

FALSE ARRESTS, (*Continued*) :—

138. Que des dommages peuvent être recouvrés des membres d'une société en nom collectif, pour fausse arrestation faite à la poursuite d'un des membres de la société.—RAINVILLE, J.—*Cowan vs Osborn*, 12 R. L., p. 29.

139. Que dans une action en dommages pour arrestation illégale le défendeur ayant fait arrêter le demandeur et ayant ensuite discontinué sa poursuite, le défendeur ne peut plaider, pour justifier cette arrestation, d'autres faits que ceux dont il se plaint dans la dénonciation.—Que dans une action en dommages de cette nature, le défendeur ne peut demander la contrainte par corps contre le demandeur pour le paiement de ses frais, dans le cas où l'action serait déboutée.—TORRANCE, J.—*Bogue vs Brouillet*, M. L. R., 1 S. C., p. 470.

140. Where a mayor, while presiding at an election of municipal councillors, commited a person to prison for ten days, without a hearing, it was held that under the circumstances of the case, there was malice and he was liable for damages.—Q. B.—*Cloutier & Trépanier*, 12 Q. L. R., p. 289.

141. Where a person was discovered cutting and removing trees from the Defendant's lands, and the excuse given, namely, that he had received permission to remove dead trees from the land of the adjoining proprietor, and that his men had unwittingly crossed the boundary line, was untrue, as he had not received any such permission, it was held that there was probable cause for the arrest.—LORANGER, J.—*Wiseman vs McCulloch*, M. L. R., 1 S. C., p. 338.

142. Where the Respondent converted to his own use certain straw bought by him with money furnished to him by the Appellant and intended for the Appellant's benefit, there was reasonable cause for his arrest.—Where a person lays an information before a Justice of the Peace, that a crime has been committed, for which such Justice has general jurisdiction, and the Justice grants a warrant upon which the accused is arrested, but he is afterwards discharged upon the ground that the Justice had no authority in that special case, the complainant, if he had probable cause, is not liable for damages for illegal arrest and imprisonment.—Q. B.—*Copeland & Leclerc*, M. L. R. 2 Q. B., p. 365.—C. R.—5 L. N., p. 340.

143. Que le propriétaire d'une maison ne peut être condamné à des dommages parcequ'il aurait arrêté un enfant qui aurait brisé une des vitres de cette maison quand même la preuve constaterait que cet enfant ne l'a pas fait malicieusement, mais qu'il a fait ce dommage en jouant avec les autres enfants.—MATHIEU, J.—*David vs Lepage*, 15 R. L., p. 454.

144. Que la partie poursuivie pour dommanes résultant d'une dénonciation calomnieuse peut, pour sa justification, prouver qu'elle a agi avec prudence, en consultant un avocat et faire déclarer à l'avocat sur quoi il s'est basé pour lui donner l'opinion qu'il lui a donnée.—MATHIEU, J.—*Black & Giberton*, 16 R. L., p. 22.

145. Que dans une poursuite en réparation civile pour dénonciation calomnieuse, le demandeur n'est tenu qu'à faire la preuve du fait dommageable, c'est-à-dire de la dénonciation, de l'arrestation et de sa libération et que c'est au défendeur à prouver les faits qui peuvent le soustraire à cette responsabilité.—MATHIEU, J.—*Brisette & Boucher*, 31 L. J. C., p. 104.

146. The fact of there having been a committal of the plaintiff by the police magistrate to the higher court for trial coupled with the other facts in the

Digitized by Google

FALSE ARRESTS, (*Continued*):—

case, created such a presumption of probable case for the arrest of the plaintiff that her action for damages was dismissed.—C. R.—*Pinsonnault & Sebastien*, 31 L. C. J., p. 167.

147. Where articles missing are found in the possession of a servant or other person in a position to take them and are not reasonably accounted for, there is probable cause for an arrest on a charge of larceny of the person in whose possession the property is found. The subsequent acquittal of the accused raises no presumption of absence of probable cause.—C. R.—*Pinsonneault vs Sébastien*, M. L. R., 3 S. C. 446.

148. The plaintiff, who was in partnership with the defendant, obtained a loan of $100 from E., for which he gave the *bon* of the firm, pretending that the money was required to meet a note of the firm and that his partner was out of town, which statements were both untrue, the money being obtained for his private use and his partner being then out of town. C. deposed to these facts before the police magistrate. *Held*:—In an action for damages for malicious criminal prosecution, that the defendant had reasonable and probable causes for having the plaintiff arrested on the charge of obtaining money under false pretences.—TAIT, J.—*Cloran vs McCrory*, M. L. R., 3 S. C., p. 464.

149. Appellant, a jeweller, desiring to increase his business, obtained advances from respondent, a wholesale dealer, and gave as security a hypothec on his property, on which he declared there were mortgages, but he only specified one of a certain amount. There was really another. Shortly afterwards, the appellant became insolvent and the respondent arrested him on the charge of obtaining money on false pretences.—*Held:* That there was probable cause for the arrest, though it appeared that the appellant did not intend fraudulently to conceal the mortgage.—Q. B.—*Grothé & Saunders*, M. L. R., 3 Q. B., p. 208.

150. The Appellant had been in the employ of the Respondents for several years and the latter, having reason to suspect that he was acting dishonestly, caused him to be arrested, but the grand jury threw out the bill. The Court held the respondents had probable cause for the proceedings adopted and the action for damages resulting there from was dismissed.—Q. B.—*Cartier & Rolland*, 32 L. C. J., p. 31.

Damages to Real Estate:—151. A Railway Company is responsible for damages suffered by a party in consequence of the cutting of certain ditches by the company in the building of their road, which line ditches served to carry away the waters, the surplus waters being thereby made to flow into a water course upon the land of the plaintiff, which land, in consequence of the insufficiency of the water course to carry off such surplus waters, was innundated. In such case the rule of law which says "that he who in the construction of any work upon "his property uses his right without violating any law or usage or title or con-"trary possession, is not held for the damages resulting therefrom," is not applicable.—Q. B.—*Grand Trunk Ry. & Miville*, 14 L. C. R., p. 469.

152. Every proprietor is answerable in damages to his neighbour for an injury which he occasions to the property of the latter by the improper use of his own, and for such injury an action in *factum* will lie.—K. B.—*D'Estimauville vs Tétu*, 2 R. de L., p. 469.

Digitized by Google

DAMAGES TO REAL ESTATE, (*Continued*) :—

153. An action in *factum* can be maintained where a building erected on the property of another is a nuisance to his neighbour, whether it be occasioned by the building itself, or by the use to which it is applied.—K. B.—*Côtévs Measam*, 2 R. de L., p. 469.

154. An action of damages will lie against the proprietor of an establishment such as a ham-curing factory, for the diminution of rent sustained by an adjacent proprietor, in consequence of offensive odours from the factory and the general character of unhealthiness which was attached to his property ; and this notwithstanding the fact that the factory was established prior to the construction of the houses injured.—Q. B.—*St-Charles & Doutre*, 18 L. J. C., p. 253.

155. In this case, the City of Montreal was held liable for damages caused from the flow of water, by a change in the level of a street, made or permitted by the City.—Q. B.—*Grenier & City of Montreal*, 3 L. N., p. 51.—JOHNSON, J.—21 L. C. J., p. 215.—Confirmed in PRIVY COUNCIL.—R. A. C., p. 1034.

156. The damage caused to adjoining proprietors by the alteration, by the City Council of the level of a roadway in the City of Montreal, gives rise to an action of indemnity against the City.—Q. B.—*Morrison & Mayor of Montreal*, 4 L. N., p. 25.

157. A street tramway car company must exercise the right of constructing its line in such a manner, as to inconvenience and damage the proprietors of property adjacent to its route, as little as possible.—Q. B.—*Ross & La Compagnie des Chars Urbains & les Syndics des Chemins à Barrière de Montréal*, 10 R. L., p. 27, 2 L. N., p. 338.

158. The owner of property in a street has no recourse against the civic corporation for damages done to his property by works done in the street by a Railway Company authorized by law to do such works, his recourse, if any, being against the company and not against the corporation, which has no control over the company.—Q. B.—*Corporation de la Cité des Trois-Rivières & Lambert*, 10 R. L., p. 441.

159. That to maintain an action of damages against a Railway Company, because of the running of the Railway over a public highway adjoining the residence of the Plaintiff, and, as alleged, obstruction of his ingress and egress thereto and from, it is necessary for the Plaintiff to prove that immediate access to his property was affected, and that he had sustained damage particular to himself and differing in kind from and beyond that of the rest of the public.—BUCHANAN, J.—*Brodeur vs Corporation of the Village of Roxton Falls*, 11 R. L., p. 447.

160. Que pour maintenir une action en dommages contre celui qui construit, avec la permission de la législature, un pont sur une rivière en Canada, le propriétaire riverain doit prouver que cette construction gêne à l'accès de sa propriété. Que, partant, d'après la loi en Canada, il est nécessaire pour réussir en son action, que le demandeur prouve des dommages actuels et spéciaux.—PRIVY COUNCIL.—*Bell & Corporation de Québec*, 5 App. Cas., p. 84, 7 Q. L. R., p. 103.

161. Qu'une compagnie de chemin de fer qui, par ses travaux de terrassement, empêche l'écoulement des eaux d'une propriété que longe son chemin, sera responsable des dommages ainsi causés par l'eau à cette propriété.—Q. B.—*Grand Trunk Railway Co. & Landry*, 11 R. L., p. 590.

162. Que celui qui a obtenu de son voisin la permission de joindre tempo-

Digitized by Google

DAMAGES TO REAL ESTATE, (*Continued*) :—

rairement un tuyau d'égoût du dit voisin, devra enlever cet égoût lorsqu'il en sera requis par lui, et s'il refuse de ce faire, le voisin pourra le faire enlever et recouvrer des damages.—C. R.—*Deacon vs Grace*, 11 R. L., p. 491.

163. Qu'une compagnie de chemin de fer est responsable des dommages soufferts par un individu en raison de ce que, par la construction de son chemin, elle a négligé de faire les travaux nécessaires pour égoutter des propriétés qui ont été inondées par le fait des dits travaux.—Q. B.—*Canadian Pacific Railway Company & Pichette*, 31 L. C. J., p. 36.

164. Qu'une corporation municipale qui fait illégalement fermer et obstruer un chemin municipal et public, existant depuis au-delà de vingt ans, et qui sert de chemin de front d'une concession, sera responsable vis-à-vis d'un propriétaire le long de ce chemin, des dommages qui résultent de cette fermeture.—Q. B.—*Corporation de la Partie Sud du Canton d'Irlande & Corporation du Canton de Colerain & Larochelle*, 13 R. L., p. 696.

165. Que dans une action pour dommage causé à l'immeuble dont le demandeur allègue être en possession à titre de propriétaire, la preuve de sa possession d'au-delà d'an et jour suffit pour appuyer son action.—Que dans une action en dommage pour avoir coupé du bois sur un immeuble, non-seulement la valeur du bois, mais le dommage causé à l'immeuble doit être pris en considération.—MATHIEU, J.—*Robillard vs Tremblay*, 11 R. L., p. 465.

166. Que le fait de placer en amont d'une écluse, des billots sur la glace de la rivière, en amoncellement de plusieurs rangs d'épaisseur, constitue une faute compensable en dommages-intérêts, quand tel fait a été la cause que la glace a été enfoncée, l'eau refoulée, la nature et l'époque de la débâcle changées, et que la débâcle elle-même a, par suite, été rendue plus rapide et plus dangereuse, au point de renverser l'écluse et de briser les quais construits.—Q. B.—*King & Ouellette*, 14 R. L., p. 331.

167. Que lorsque la Cité de Montréal est en possession de canaux d'égouts, quand même ces égouts n'auraient pas été construits par elle-même, elle est tenue en loi de les entretenir en bon état, et elle est responsable des dommages que peut causer leur mauvais état à ceux qui s'en servent; en cela ses pouvoirs ne sont pas législatifs, et elle ne peut prétendre qu'elle n'est tenue à cet entretien que suivant ses ressources pécuniaires et qu'il est laissé à sa discrétion.—MOUSSEAU J.—*Leduc vs Cité de Montréal*, M. L. R., 1 S. C., p. 300.

168. Qu'une corporation municipale est responsable du dommage qu'elle cause à un propriétaire sur une rue, dont elle change le niveau.—MATHIEU, J.—*Turgeon vs City of Montreal*, M. L. R., 1 S. C., p. 111.

169. That in the case submitted the Plaintiff was not entitled to damages by reason of the raising of the level of the sidewalk, no damage having been suffered by the Plaintiff in consequence of the change.—C. R.—*Boudreau vs Corporation of Sherbrooke*, M. L. R., 2 S. C., p. 188.

170. Qu'une corparation municipale qui, en vertu d'une autorisation de la Législature, permet l'élévation d'une rue, ne sera responsable que des dommages résultant de la dépréciation en valeur des propriétées affectées par ce changement de niveau, et qu'elle n'est pas tenue d'élever les bâtisses dans la même proportion que la rue.—MATHIEU, J.—*Bronsdon vs Cité de Montréal*, 12 R. L., p. 610.

171. In the case of an offensive smell arising from a drain into which the

Digitized by Google

DAMAGES TO REAL ESTATE, (*Continued*) :—

Defendant discharged water from his tannery, under the circumstances disclosed in this case, the Defendant was not liable for damages.—Q. B.—*McGibbon & Bédard*, 30 L. C. J., p. 282.

172. That where the proprietor of a tannery, for the purpose of his industry, makes such use of a private water-course as to render the water unfit for domestic purposes and dangerous to health, and to deprive the proprietors of land bordering on said stream, of the use and enjoyment of same, damages will be be granted against him and also an injunction against such use of stream.—JOHNSON, J.—*Weir vs Claude* M. L. R., 2 S. C., p. 326, 31 L. C. J., p. 39. (Reversed in Appeal, 32 L. C. J., p. 213, but carried to the Supreme Court.).

173. Qu'en vertu de la section 46 de l'Acte des chemins de fer S. Rév. C., toute compagnie de chemin de fer doit payer des dommages résultant de son droit de mettre des clôtures paraneiges sur les terrains situés le long de sa voie ou ligne de chemin de fer, lorsque ces dommages diminuent la valeur de ces terrains, et que ces dommages sont des dommages réels à la propriété et que le propriétaire, même non en possession actuelle, peut prendre l'action pour réclamer ces dommages.—TASCHEREAU, J.—*Sanche vs Canadian Pacific Ry.*, 16 R. L. p. 296.

Damages arising from acts of Public officials :—174. A priest who solemnizes the marriage of a minor, without the consent of her parents, is liable in damages to the parties whose authority, has thus been disowned and such action is maintainable without a previous suit to set aside the marriage.—Q. B.—*Larocque & Michon*, 8 L. C. R., p. 222.

175. A registrar is responsible for damages or loss caused by his neglect to enregister a mortgage or by a certificate given by him wherein an omission occurs, from the effect of which a purchaser in good faith is troubled in his possession. An action in such case must be one *en garantie*, the register being the *garant* of the party to whom he has directly caused damage.—Q. B.—*Montizambert & Talbot*, 10 L. C. R., p. 269.

176. Justices of the peace are liable in damages for illegal and malicious commitment, made without previous examination of witnesses before them in the presence of the accused.—C. R.—*Lacombe vs Sainte Marie*, 15 L. C. J., p. 276.

177. That the prothonotary is not liable for the damages caused by the illegal issue of a writ of *saisie-arrêt* before judgment, unless it be proved that he acted in bad faith or without reasonable or probable cause.—Q. B.—*McLennan & Hubert*, 22 L. C. J., p. 294.

178. Qu'il n'y a pas de recours contre le protonotaire qui, sans malice, donne un bref d'exécution pour les frais sur un incident de la procédure, au procureur auquel ils ont été accordés par distraction.—C.R.—*Pacaud vs Barwis*, 12 Q. L. R., p. 99.

179. Que celui à qui une omission dans un certificat de rigistrateur d'hypothèques a fait subir une perte, n'a pas de recours contre le régistrateur que pour ce qu'il n'a pas pu recouvrer après avoir exercé tous les recours personnels et hypothécaires que lui donne la loi. Les régistrateurs sont des officiers publics qui ont à droit d'un avis d'un mois de la poursuite pour dommages causés par des omissions dans les certificats qu'ils donnent.—C. R.—*Grenier vs Rouleau*, 8 Q. L. R., p. 323.

Digitized by Google

DAMAGES ARISING FROM ACTS OF PUBLIC OFFICIALS (*Continued*) :—

180. A registrar is responsible to the creditor for the damage caused by the omission of a hypothec in his certificate furnished to the sheriff, and the creditor may proceed against the registrar to recover the amount, with interest, without showing that the debtor and others liable are insolvent.—Q. B.—*Trust & Loan Company of Canada & Dupras*, 3 L. N., p. 332.

181. Que l'huissier porteur d'un bref de saisie-gagerie, qui signifie d'abord une copie du bref au locataire et qui ne va ensuite saisir que plusieurs jours après, est responsable en dommages au demandeur pour les effets que le locataire a, dans l'intervalle de la signification à la saisie, enlevés de sur les lieux loués et ainsi soustraits au privilège du demandeur.—C. R.,—*Michon vs Venne*, M. L. R., 2 S. C., p. 367.

182. Que l'huissier qui saisit les effets mobiliers entre les mains d'un tiers, sans son consentement, comme appartenant au défendeur, sera, sur la poursuite de ce tiers, condamné à lui payer la valeur (C. C., p. 553.)—Q. B.—*Flagg & Vaughan*, 12 R. L., p. 461.

183. Qu'une personne dont les meubles sont saisis erronément en vertu d'un bref d'exécution, l'huissier ayant pris une personne de même nom pour une autre, a droit à des dommages exemplaires, fixés dans l'espèce à $15.00 ; le saisissant étant dans ce cas responsable de l'erreur de l'huissier.—TASCHEREAU, J.—*Lalonde vs Bessette*, M. L. R., 4 S. C., p. 39.

184. Que la vente des effets déclarés insaisissables par la loi est illégale, quand même il n'y aurait eu, avant la vente, aucune opposition ou intervention et le débiteur a un recours en dommages contre le créancier qui les a saisis.—BUCHANAN, J—*Lemoine vs Giroux*, 9 L. N., p. 147.

185. L'officier public dont la conduite révèle mauvaise foi dans l'exécution des devoirs de sa charge, n'a pas droit à un mois d'avis avant l'institution de l'action en dommages. Le fait de priver illégalement une personne de l'exercice de son droit d'électeur municipal, donne droit à un recours en dommages intérêts.—ANGERS, J—*Benatchez vs Hamond*, 7 Q. L. R., p. 25, 4 L. N. p. 191.

Damages arising from Civil Suits :—186. Une corporation peut être recherchée en dommages pour saisie illégale des meubles d'un contribuable.—C. R.—*Blain vs Corporation de Granby*, 5 R. L., p. 180.

187. Celui qui diffame une des parties par des écritures au dossier, sans cause probable, sera passible de dommages.—Q. B.—*Pacaud & Price*, 15 L. J. C., p. 281.

188. That the prothonotary is not liable for the damages caused by the illegal issue of a writ of *saisie-arrêt* before judgment unless it be proved that he acted in bad faith or without reasonable and probable cause.—Q. B.—*McLennan & Hubert*, 22 L. C. J., p. 294.

189. See also C. R.—*Pacaud vs Barwis*, 12 Q. L. R., p. 99, cited at n. 178 *ante*.

190. That where a writ of attachment before judgment is improvidently sued out, the party whose effects are seized has a right to recover damages, the amount of which will vary according to whether there is malice or not.—JOHNSON, J.—*Watson vs Thompson*, 24 L. C. J., p. 129.

191. That although an affidavit may be sufficient to sustain a *capias*, yet this will not alone justify an action of damages for false imprisonment, unless

Digitized by Google

DAMAGES ARISING FROM CIVIL SUITS, (*Continued*) :—

want of probable cause and malice are shown.—Q. B.—*Shaw & McKenzie*, 1 Q. B. R., p. 25.

192. Damages lie for maliciously instituted civil suits, and one is not obliged to wait until judgments are rendered in them before bringing the action for damages.—C. R.—*Aubin vs Quintal*, 29 L. C. J., p. 156.

193. Que dans une poursuite en dommages résultan t de procédés judiciaires, il faut prouver que l'action qui a donné naissance aux dommages a été instituée malicieusement et sans cause ou raisons suffisantes.—C. R.—*Labelle vs Martin*, 30 L. C. J., p. 292.

194. Qu'une personne dont on aura fait saisir les meubles pour une taxe de terrain qui avait été payée, pourra recouvrer des dommages de la partie qui l'a fait saisir, même si c'est par erreur et sans malice que la saisie a émané.—TORRANCE, J.—*Brault vs Marsolais*, 10 R. L., p. 111.

195. Qu'il y a lieu à une action pour recouvrer des dommages résultant de poursuites mal fondées.—Q. B.—*Poutré & Lazure*, 12 R. L., p. 465.

196. The sale of goods declared unseizable by law is illegal, and even though no opposition be put in before the sale, the debtor has his recourse in damages against the seizing creditor.—BUCHANAN, J.—*Lemoine vs Giroux*, 9 L. N., p. 147.

197. Que l'huissier qui saisit les effets mobiliers entre les mains d'un tiers, sans son consentement, comme appartenant au défendeur, sera, sur la poursuite de ce tiers, propriétaire de ces effets, condamné à lui en payer la valeur (C. C. P., 553.)—Q. B.—*Flagg & Vaughan*, 12 R. L., p. 461.

198. Qu'il n'y a pas droit d'action en dommages contre une personne qui fait saisir-gager les biens-meubles de son locataire, lorsque cette action est rapportée en Cour et n'est déboutée que parce que le saisissant n'a pu alors prouver qu'il avait, avant l'action, fait une demande de paiement, mais, qu'en défense à l'action en dommages, il établit que telle demande avait réellement été faite.—GILL, J.—*Soullières vs de Repentigny*, M. L. R., 2 S. C., p. 415.

199. Que la continuation de son commerce par un marchand insolvable, après refus de s'arranger avec ses créanciers et de leur faire cession, étant, aussi bien que sa cache de ses biens avec intention de frauder ses créanciers, une cause légale d'émanation de saisie-arrêt avant jugement, le défendeur n'a pas de recours en dommages pour l'émanation de la saisie-arrêt fondée sur ces deux moyens, qu'en alléguant et prouvant la fausseté des deux.—Que lorsque les dommages sont réclamés comme résultant de la fausseté de l'allégation de cache par le débiteur de ses biens, avec intention de frauder, et séparément de la saisie, la définition des faits dont le jury est appelé à s'enquérir, doit comprendre l'une et l'autre spécialement.—C. R.—*Drolet vs Garneau*, 10 Q. L. R., p. 139.

200. Qu'il y a un recours pour dommages réels et exemplaires en faveur d'une personne dont les biens-meubles sont, sans droit, saisis et gagés, contre celle qui a fait émaner cette saisie gagerie et qui ne l'a pas rapportée en Cour.—PAPINEAU, J.—*Brouillet vs Clarke*, M. L. R., 2 S. C., p. 417.

201. Qu'une personne dont les biens sont saisis-arrêtés avant jugement par un créancier, sans cause raisonnable et probable, peut, dans la même action, réclamer des dommages par demande incidente, et opposer à l'action un plaidoyer de compensation basé sur les dommages par lui réclamés par sa demande incidente.—MATHIEU, J.—*Furniss vs Bleault*, M. L. R., 2 S. C., p. 419.

Digitized by Google

DAMAGES ARISING FROM CIVIL SUITS, (*Continued*) :—

202. Que sur une demande en dommages instituée par suite de ce que le défendeur a pris contre le demandeur une saisie-arrêt avant jugement, laquelle saisie a été plus tard annullée, le défendeur doit être condamné à des dommages mineurs, lorsque le défendeur a fait des actes qui, sans être frauduleux, étaient de nature à faire croire au défendeur que le demandeur dissipait et vendait ses biens en vue de frauder.—C. R.—*Emond vs Gravel*, 12 Q. L., R., p. 69.

203. There is no right of action for damages resulting from the issue of an injunction or other civil suit, unless the suit were instituted without probable cause, and the fact that the injunction was taken by a *prête-nom* is not evidence of want of probable cause.—When the annual report of acompany was misleading and seemed to show that the assets had been reduced by a large amount, there was probable cause for the issue of an injunction to restrain the company from declaring a dividend, more particularly as the company failed to disclose their true position when they got notice before the writ issued.—JOHNSON, J.—*Montreal Street Ry. Co. vs Ritchie*, M. L. R., 3 S. C., p. 232.

204. Qu'il n'y a pas d'action en dommages contre la partie qui fait exécuter de bonne foi un jugement de contrainte par corps, quand même ce jugement serait mal rendu.—LARUE, J.—*Gagnon vs Julien*, 14 Q. L. R., p. 5.

205. In this case the court of first instance dismissed the plaintiff's action for damages arising from his being arrested, as he alleged, without reasonable and probable cause, on a *capias*. The Court of Review reversed this judgment and awarded $100 damages, which judgment the Court of Queen's Bench confirmed. —Q. B.—*Drapeau & Deslauriers*, 32 L. C. J., p. 191.

Damages arising from Assaults.—206. A parent may maintain an action for *tort* in his own name for rape committed upon his minor child, a servant, if he is thereby deprived of her services and otherwise damnified, and although the *tort* was a felony, the plaintiff might nevertheless sue in damages without first proceeding criminally.—TASCHEREAU, J.—*Neill vs Taylor*, 15 L. C. R., p. 102.

207. Where the respondent, not being a guest of the hotel of the appellants, made use of the toilet room thereof, scattered paper on the floor, and was, in consequence, put out of the house by the porter of the hotel, the Court of Queen's Bench refused to alter the judgment of the Superior Court, which condemned the appellants to pay $15 damages and the full costs of the action, for the assault thus committed.—Q. B.—*Hogan & Dorion*, 2 Q. B. R., p. 238.

208. In an action for damages by the father of a minor for rape, where the case rests upon the unsupported testimony of the girl, and there is counter evidence to the effect that the girl is not of irreproachable character, the action will not be maintained.—TASCHEREAU, J.—*Bigonesse vs Brunelle*, 6 L. N., p. 270.

209. A conviction before justices of the peace for an assault and battery may be pleaded in bar to an action for the recovery of damages for the same assault.—C. R.—*Pingault vs Symmes*, 7 L. N., p. 3.

210. The respondent was standing beside his cart, which was loaded with wood, disputing with the appellant about it, when the latter pushed the cart over, thereby so wounding the respondent's finger, that it had to be amputated. Judgment against appellant for $600 damages.—Q. B.—*Destlets & Gingras*, 10 R. L., p. 275.

Digitized by Google

DAMAGES ARISING FROM ASSAULTS, (*Continued*) :—

211. Where there is a right of action for a trifling assault and where no material damage is done, and the plaintiff refuses all settlement, and begins and then abandons a prosecution before a magistrate, in order to bring an action of damages, the Court will reduce damages, which have no reasonable measure, to such a sum as would be imposed as a fine by a magistrate, with costs against defendant.—Q. B.—*Papineau & Taber*, M. L. R., 2 Q. B., p. 107.

212. A city corporation is liable in damages for assaults committed by its servants, such as policemen, when the assaults are approved and attempted to be justified by the corporation.—*City of Montreal & Doolan*, 18 L. C. J., p. 124.

213. That the City of Montreal is responsible for the acts of the members of its police force and they are the agents, employees and *préposés* of the said City, and if members of the said police force, while in the execution of their functions as such, commit any unlawful or unauthorized act, such as assaulting an innocent onlooker during a *mêlée*, they render the said City liable for the same.—C. R.—*Laviolette vs Thomas*, 31 L. C. J., p. 197.

214. That the City of Montreal is liable in damages for an unjustifiable assault committed on a citizen by a policeman while on duty, and that without identifying such policeman by name or number, it is sufficient to prove that he was one of a squad wearing the policeman's uniform and carrying the *bâton*.—MATHIEU, J.—*Guénette vs City of Montreal*, M. L. R., 4 S. C., p. 69.

Damages.—Miscellaneous :—215. A party setting fire upon land at an improper and unfitting time is by that mere fact responsible for the loss thereby of a threshing machine which had been brought on his land to thresh his grain.—Q. B.—*Hynes & McFarlane*, 10 L. C. R., p. 502.

216. In Lower Canada, claims arising from *torts* are considered debts as well as those arising from contracts, and this in conformity to the French and Roman law.—SMITH, J.—*Redpath vs Giddings*, 9 L. C. J., p. 225.

217 A corporation is liable for damages for neglect of duty, though the damages proved appear to have been sustained by plaintiff in consequence of his own negligence.—C. R.—*Lecours vs Corporation of St Laurent*, 1 L. C. L. J. p. 106.

218. A person is liable in damages for the slightest negligence in respect to a child of tender years, the want of capacity in the latter rendering extreme care, and watchfulness necessary.—BADGLEY, J.—*Beauchamp vs Cloran*, 1 L. C. L. J., p. 121.

219. The power granted to school commissioners to remove masters for misconduct or incapacity, after mature deliberation, does not relieve them from liability to damages if such removal take place without sufficient cause.—C. R.—*Brown vs School Commissioners of Laprairie*, 1 L. C. J., p. 40.

220. La présence des défendeurs, au sein d'une assemblée tumultueuse, résultat d'un complot, les rend responsables des dommages causés par cette assemblée, lors même qu'ils n'auraient pas activement participé dans les voies de fait. —Q. B.—*Nianentsiasa & Akwirente*, 6 L. C. J, p. 367.

221. L'employé qui s'engage comme ouvrier capable pour travailler et faire des ouvrages à l'entreprise dans une manufacture, est responsable des dommages faits aux matériaux ou à partie des matériaux, et il doit payer la valeur des dits

Digitized by Google

DAMAGES.—MISCELLANEOUS, (*Continued*) :—

matériaux, lorsque tels dommages proviennent de sa faute ou de son incapacité. —Les offres, par les défendeurs, des chaussures endommagées dans tels cas, avec ensemble un équivalent en argent, pour le montant du salaire gagné sont des offres suffisantes et l'acceptation d'icelles est une admission et une reconnaissance par l'employé des vices de son ouvrage et du paiement de son travail.—BEAUDRY, J.—*Dansereau vs James*, 4 R. L., p. 387.

222. Quoiqu'en général un homme ait le droit de refuser de transiger avec un autre ou avec une classe particulière d'hommes et qu'en général un nombre d'hommes puissent s'obliger ensemble de ne pas travailler pour une personne en particulier, ou pour une certaine classe d'hommes, ou suivant un certain prix, il n'est permis que ces combinaisons ou arrangements s'étendent jusqu'à troubler ces personnes ou classes de personnes dans leurs propres affaires, et il est expressément défendu de les menacer au moyen d'amendes ou autres impositions, dans le cas où ces personnes ou classes de personnes ne se plieraient pas aux exigences de ces combinaisons ou arrangements.—MACKAY, J.—*Perrault vs Bertrand*, 5 R. L., p. 152.

223. Le mari a une action en dommages contre le séducteur de sa femme.—ROUTHIER, J.—*Laferrière vs Bibardy*, 5 R. L., p. 742.

224. In the case submitted in an action for damages for the non-execution of a promise of marriage and *en déclaration de paternité*, there was sufficient proof of the promise and that the subsequent misconduct of the Plaintiff justified the Defendant in his refusal to keep such promise and that the proof was sufficient to pronounce the *déclaration de paternité*. *Quid.* Is it the right of a spinster of full age to obtain damages for seduction.—Q. B.—*Poissant & Barrette*, 15 L. C. R., p. 51.

225. Que le seul fait du refus d'exécuter une promesse de mariage ne peut, par lui-même, motiver une condamnation à des dommages et intérêts.—CARON, J. —*Chamberland vs Parent*, 8 Q. L. R., p. 299.

226. Que les dommages réclamés par la fille séduite ne sont, à part les frais de gésine, dus que pour l'inexécution de la promesse du mariage que la séduction que la séduction fait présumer, et que le concubinage, pendant plus de trois ans, de la fille avec son séducteur, et son allégation qu'elle n'a cédé la première fois que sur ses assurances qu'il n'y avait pas de danger pour elle, et qu'il la marierait si elle devenait grosse, détruisent cette présomption, et ne lui permettent pas de recouvrer plus que ses frais de gésine.—C. R.—*Turcotte vs Nacké*, 7 Q. L. R., p. 230.

227. That damages for seduction can be demanded and recovered only when the seducer has accomplished his end by means of a promise of marriage or by means of artifices or deceitful manœuvres.—WURTELE, J.—*Cameron vs Steele*, 11 L. N., p. 234.

228. Que celui qui abandonne, sans motif légitime, un projet de mariage, peut être condamné à payer à l'autre partie des dommages, mais que ces dommages ne peuvent inclure la perte des avantages que le futur qui refuse d'exécuter la promesse se proposait d'accorder.—MATHIEU, J.—*Demers vs Hébert*, 13 R. L., p. 466.

229. Que lorsqu'une fille mineure, orpheline, s'engage, sans le consentement de son tuteur, à contracter un mariage, et que, subséquemment, regrettant

Digitized by Google

DAMAGES.—MISCELLANEOUS, (*Continued*) :—

cet engagement, elle demande à son tuteur de le rompre, l'intervention de ce dernier et son opposition au mariage, sans autre raison, est légitime, et ne le rend pas responsable des dépenses d'argent que le prétendant aurait faites en vue de ce mariage, ni des dommages qu'il peut en servir. Que bien plus, le fait seul d'avoir décidé ce mariage sans le consentement du tuteur et d'avoir convoqué un conseil de famille, en ne lui en donnant avis que par le notaire, serait suffisant pour justifier le tuteur de s'opposer à un mariage décidé en de pareilles circonstances.—MATHIEU, J.—*Gadbois vs Morache*, M. L. R., 3 S. C., p. 38.

230. The defendants are liable for damages caused by water to goods in the plaintiff's cellar, the water having entered by means of a hole from a service pipe left open during repairs made by the defendants to the street.—C. R.—*Béliveau vs City of Montreal*, 6 L. C. R., p. 487.

231. The Corporation of the City of Montreal is liable for damages caused to goods stored in a cellar forming part of the premises leased to the plaintiff, in consequence of the choking of a shaft in one of the public drains under the charge of the Corporation, thereby causing the water to flow back into the cellar through a private drain. The cost of hiring other storage for the goods will be included in the damages awarded and is not a damage too remote to be recovered. —Q. B.—*City of Montreal & Mitchell*, 14 L. C. R., p. 437.

232. The Corporation of Montreal is liable for damages occasioned by a mob riotously entering into the house of the plaintiff in the city and breaking windows and furniture and spilling liquor.—SMITH, J.—*Carson vs City of Montreal*, 9 L. C. R., p. 403.

233. The Corporation of the City of Montreal is liable for loss occasioned by the burning of property within the city by persons riotously assembled therein.—Q. B.—*Watson & City of Montreal*, 10 L. C. R., p. 426.

234. A city corporation is liable for damage caused by the overflowing of their drains, where those drains have become obstructed; and where packages of bottled porter and ale are rendered unmerchantable, damages may be claimed, although the contents of the bottles are not damaged.—MONDELET, J.—*Kingan vs City of Montreal*, 2 L. C. J., p. 78.

235. Le fait de prêter un masque à un enfant et de lui fournir un accoutrement grotesque ne rend pas la personne qui a prêté ce masque responsable des dommages causés par cet enfant en entrant dans un hôtel et y causant une grande frayeur à une femme qui s'y trouvait.—C. R.—*Lamoureux vs Lamoureux*, 4 R. L., p. 539.

236. The plaintiff was awarded $50 damages against the defendant, who had shot two of his, plaintiff's, dogs, whilst they were trespassing on his property.—TORRANCE, J.—*Trenholm vs Mills*, 4 L. N., p. 79.

237. Le fait de priver illégalement une personne de l'exercice de son droit d'électeur municipal, donne lieu à un recours en dommages intérêts ($25 accordées).—ANGERS, J.—*Bénatches vs Hamond*, 7 Q. L. R., p. 25, 4 L. N., p. 191.

238. Where the city illegally removed the plaintiff's name from the list of voters, $30 damages were awarded to the plaintiff.—DOHERTY, J.—*Martin vs City of Montreal*, 6 L. N., p. 23.

239. Qu'il y a solidarité entre deux ou plusieurs personnes pour les dommages résultant d'un délit commis conjointement, et que le règlement fait par l'un libère les autres.—STUART, J.—*Giroux vs Blais*, 7 Q. L. R., p. 309.

Digitized by Google

DAMAGES.—MISCELLANEOUS, (*Continued*) :—

240. The expenses of attending an auction sale for the purpose of buying certain effects which were advertised for sale, but were not sold, cannot be recovered from the assignee of the insolvent estate who had advertised them for sale. —CARON, J.—*Dussault vs Bédard*, 11 Q. L. R., p. 69.

241. Where a carrier is presumed to know that the goods which he was carrying were intended for immediate sale, he may be held liable for the loss of profits on such sale arising from non-delivery, but he will not be held liable for the loss of custom, as that is too remote.—MCCORD, J.—*Behan vs Grand Trunk Ry. Co.*, 11 Q. L. R., p. 60.

242. Que le propriétaire d'un cheval infirme qui l'a donné en soin à une personne qui n'est pas maréchal, peut refuser de le reprendre et en recouvrer la valeur de celui qui s'est chargé de le soigner, si ce dernier ne le guérit pas comme il l'avait promis, mais, au contraire, lui cause par les remèdes certaines blessures graves, et que la cour n'est pas tenue en ce cas de prendre en considération la valeur actuelle du cheval et de disposer du dit cheval par le jugement. —GILL, J.—*Levi vs Gagnon*, 10 R. L., p. 68.

243. A fee paid to Counsel for advice will not be allowed as part of the damages for a breach of contract.—Q. B.—*Cox & Turner*, M. L. R., 2 Q. B., p. 278.

244. That an action of damages setting forth that a Bank, to which Plaintiff had transferred certain shares as collateral security for an advance, had, without right and against the will of the Plaintiff, sold the said shares at a third of their value, on purpose to injure the Plaintiff, is not demurable, because the Plaintiff has not offered to Defendant the alternative to substitute other shares.—Q. B.— *Gilman & Campbell*, M. L. R., 2 Q. B., p.

245. That a person who, knowingly, permits the child of another to be exposed to infection from a contagious disease (*smallpox*) existing in her house, is responsible for the loss and damages thereby occasioned to the father of the child.—TORRANCE, J.—*Gélineau vs Brossard*, M. L. R., 2 S. C., p. 295.

246. A post master is responsible for a registered letter lost through his neglect or that of his minor son, employed by him as his assistant, in leaving it in an exposed place in his office, contrary to the regulations of the Post Office Department.—DUNKIN, J.—*Delaporte vs Modden*, 17 L. C. J., p. 29.

247. Qu'un maître de poste qui retarde injustement d'expédier une lettre, à lui confiée, et qui, lorsque la personne qui lui a remise cette lettre, se plaint de ce retard, lui reproche de vouloir lui faire du chantage, et ajoute qu'elle avait besoin d'argent et qu'elle se servait de faux prétextes pour en obtenir, peut être poursuivi en dommages, et une somme de $10, par lui offerte, n'est pas suffisante. Jugement pour $20.—TORRANCE, J.—*Chartrand vs Archambault*, M. L. R., 2 S. C., p. 427.

248. Que, lorsque le gardien d'un cheval, harnais et voiture saisis, a placé dans une écurie de louage, tels cheval, harnais et voiture, le propriétaire de telle écurie de louage, sachant que tels effets n'appartiennent pas au gardien, et qu'il causerait un certain tort à celui en faveur de qui est faite la saisie, ne peut vendre tels cheval, harnais et voiture et s'approprier le produit de la vente, en paiement de la pension et garder de tels effets, sans s'exposer à des dommages. (C. C. 1487 & 1711.)—C. R.—*Morris vs Miller*, M. L. R., 2 S. C., p. 476, 14 R. L., p. 659, 31 L. C. J., p. 209.

249. A person who improvidently registers a claim against an immoveable

Digitized by Google

DAMAGES.—MISCELLANEOUS, (*Continued*) :—

property, without having a legal right to do so, is liable to the registered owner of such property, for all damages caused by such improvident registration, and the owner of the property has a right of action to cause the entry in the books of the registrar to be cancelled. (C. C. 2149.)—JETTÉ, J.—*Daigneault vs Demers*, 26 L. C. J., p. 126, 12 R. L., p. 66.

250. Que le locataire qui prend possession d'un terrain en culture, avant l'expiration du bail, est responsable des dommages que ses animaux pourront causer à la récolte du locataire. (C. C. 1653.)—PLAMONDON, J.—*Crevier vs Blaignier dit Jarry*, M. L. R., 2 S. C., p. 256.

251. A person is liable in damages for having induced another to go across the international boundary line, and thereby causing him to be arrested for an alleged debt, which it appears did not exist.—BROOKS, J.—*Woodwards vs Butterfield*, 6 L. N., p. 228.

252. A person performing a voluntary and gratuitous service, such as the collection of the offertory in a church, will not be permitted to make use of his office to offend and humiliate a member of the congregation, and an action of damages will lie for such offence. A wilful and marked omission to present the plate to the plaintiff, a member of the congregation, was held to be an offence for which an action lay, and $5 damages were awarded.—JETTÉ, J.—*Lebeau vs Turcot*, 7 L. N., p. 259.

253. Qu'une personne chargée de faire la quête dans une église pendant l'office divin et qui par préméditation néglige de présenter l'escarcelle à un paroissien de manière à attirer l'attention de ceux qui sont dans l'église, se rend coupable vis-à-vis de ce paroissien d'une insulte pour laquelle il est passible de dommages.—C. R.—*Primeau vs Demers*, M. L. R., 3 S. C., p. 88.

254. Qu'il existe en notre droit une action en dommages pour venger la mémoire des ancêtres, et que cette action peut être instituée par l'un des héritiers ou descendants seul, sans le concours des autres.—ANDREW, J.—*Roy vs Turgeon*, 12 Q. L. R., p. 186.

An English case on same subject :—See 10 L. N., p. 101.

255. That in an action for damages for breach of promise of marriage although no actual written promise of marriage is proved, the defendant with nevertheless he condemned in damages if it appear from the evidence adduced that the conduct of the defendant was such as to give the plaintiff reasonable cause to believe that he intended to marry her.—C. R.—*Chapman vs Scott*, 31 L. C. J., p. 327.

256. When, in the plans of the property of an estate there was a mistake made in the width of a street fronting certain lots and some of these lots were sold to the plaintiff according to the erroneous plan, and the vendors, when the mistake was pointed out to them, offered to cancel the sale, which offer the plaintiff refused, but chose to adhere to his bargain, which was a profitable one for him, and afterward commenced an action for damages, founded upon the alleged lessened value of the property arising front its facing on a narrower street than the deed indicated, the court held the action did not lie.—DAVIDSON, J.—*Inglis vs Phillips*, M. L. R., 3 S. C., p. 403.

257. Que si par inconstance ou autrement celui qui avait promis de se marier change de résolution et refuse d'accomplir sa promesse, il doit des dommages-intérêts à l'autre partie.—TASCHEREAU, J.—*Cardinal vs Dorice alias Doris*, M. L. R., 4 S. C., p. 17.

Digitized by Google

MISCELLANEOUS, (*Continued*) :—

258. An action of damages will lie at common law for invasion of property in artistic works and is not taken away by the copyright act giving an action for penalty.—ANDREW, J.—*Bernard vs Bertoni*, 14 Q. L. R., p. 219.

259. Qu'à l'occasion de fêtes ou réjouissances publiques, lorsque la cité de Montréal permet, dans les endroits publics, les feux d'artifice, elle est responsable des accidents qu'ils peuvent occasionner, même dans le cas où ces feux d'artifice sont sous le contrôle d'organisateurs particuliers.—LORANGER, J.—*Forget vs Cité de Montréal*, M. L. R., 4 S. C., p. 77.

260. That reports made and accounts rendered by directors in the course of their duty, though made and issued to the shareholders only, as to the state of the affairs of the Company, are considered the representations of the Company, not only to the shareholders, but to the public, if they are published and circulated by the authority of the directors or a general meeting, and the directors are personally liable for injury caused to third parties by false representations contained in a report of the directors to the shareholders but the injury must be the immediate and not the remote consequence of the representation, and it must also appear that the false representation was made with the intent that it should be acted upon by such third parties, and a shareholder cannot claim damages against such directors for having been induced to purchase shares by misrepresentation, if he has continued to hold them without objection long after he had knowledge or full means of knowledge of the untruth of the representations on which he bought them.—JOHNSON, J.—*Rhodes vs Starnes*, 22 L. C. J., p. 113.

261. Action de dommages résultant de vente fictive et manœuvres frauduleuses employées pour faire coter à la bourse des valeurs fictives.—Q. B.—*Dorion & Crowley*, 30 L. C. J., p. 65, 4 Q. B. R., p. 322.

Measure of Damages :—262. In an action against the master of a steamer for injury done to the wharf by the steamer striking against it when making her birth, it was held that, the wharf not being in good order, the rule of two thirds new for old might be urged as a guide to the discretion of the Court in awarding damages.—Q. B.—*Harbour Commis. of Montreal & Grange*, 10 L. C. R., p. 259.

263. In an action for damages against a Railway Company for unduly refusing to register a transfer of shares during several months, the true measure of damage is the difference between the price of the stock at the time of such refusal and the price at the time of the subsequent registration of the transfer.—Q. B.—*Grand Trunk Ry. & Webster*, 6 L. C. J., p. 179.

264. In an action of damages for breach of an executory contract for the sale of hops, payable on delivery, the Defendant having refused to accept the hops tendered, the proper measure of damages is the difference between the contract price and the market price at the time of the refusal to perform the contract.—PRIVY COUNCIL.—*Boswell & Kilborn*, 6 L. J. C., p. 108, 15 Moore P. C. Rep., p. 109.

265. In estimating damages caused by the floors of a building having sunk, allowance will be made in favor of the architect and contractors for what the work would originally have cost had timber been originally used of a size and quality sufficient to support the bridging joists and floors and no allowance will

Digitized by Google

MEASURE OF DAMAGES, (*Continued*) :—

be made to the proprietor for moneys paid by him to his tenants for actual expenditure by them in removing out of the building during the time that the necessary repairs are being made.—Q. B.—*David & McDonald*, 8 L. C. J., p. 44, 14 L. C. R., p. 31.

266. La douleur physique et morale peut aussi donner ouverture à l'action en réparations civiles résultant d'une blessure corporelle.—Q. B.—*Pelletier & Bornier*, 3 Q. L. R., p. 94.

267. In the case of a breach of contract to deliver possession of premises leased, nominal damages should be awarded by the Court, although no special damage is proved to have resulted from such breach.—C. R.—*Mulcair vs Jubinville*, 23 L. C. J., p. 165.

268. In the absence of proof of malice, in the issuing of a writ of attachment before judgment without proper cause, nominal damages and costs of the lowest class of Superior Court case will be awarded, but where it is evident that the party sueing out the writ has acted maliciously then exemplary or vindictive damages will be awarded.—JOHNSON, J.—*Watson vs Thompson*, 24 L. C. J., p. 129.

269. The Court may assess damages, arising from wrongful and malicious arrest, under a *capias*, in absence of any special proof of damage.—C. R.—*Bannatyne vs Canada Paper Company*, 25 L. C. J., p. 14.

270. Damage may be presumed from the publication of a slander to one or more individuals.—C. R.—*Denis vs Théoret*, 27 L. C. J., p. 12.

271. In an action for personal injury caused by negligence of the Railway Company towards a passenger, the damages cannot be assessed according to any mathematical calculation, but the jury ought to take into account all the circumstances of the case, including the income that the Plaintiff was earning before he was injured, and give reasonable compensation.—ENGLISH COURT OF APPEAL.—*Phillips vs London & South Western Ry. Co.*, (42 L. T. R., N. S., 6), 3 L. N., p. 214.

272 In this case the Court estimated the damages due to the Plaintiff, who sued for the loss of her husband's life by and accident, by capitalizing a sum, the interest of which would maintain her and her five children, to wit : $6,000.—JOHNSON, J.—*Byrd vs Corner* 6 L. N., p. 364.

273. In an action of damages, if the amount awarded in the Court of first instance is not such as to shock the sense of justice and to make it apparent that there was error or partiality on the part of the judge, (the exercise of a discretion on his part being, in the nature of the case, required), an Appelate Court will not interfere with the discretion such judge has exercised in determining the amount of damages.—SUPREME COURT.—*Levi vs Reed*, 6 S. C. R., p. 482.

Similar decision.—SUPREME COURT.—*City of Montreal & Dame Hall*, 12 S. C. R., p. 74, C. D., p. 284.

274. Where a new trial had been ordered by the Court of Queen's Bench, on the ground alone of excessive damages, it was held that, inasmuch as there had beed no misdirection, the judge having put to the jury whether all was done which was reasonable and practically possible under the circumstances of the case and inasmuch as the damages were not of such an excessive character as to show that the jury had been either influenced by improper motives or led into error, there ought not to be a new trial.—PRIVY COUNCIL.—*Lambkin & South Eastern Railway Company*, 5 App. Cas., p. 532, 3 L. N., p. 162, R. A. C., p. 970.

Digitized by Google

MEASURE OF DAMAGES, (*Continued*) :—

275. Under our law, nominal or exemplary damages may be awarded for breaches of obligation where there is no actual proof of damages.—Q. B.—*County of Ottawa & Montreal, Ottawa and Occidental Railway*, 28 L. C. J., p. 29, M. L. R., 1 Q. B., p. 46.—Confirmed in the SUPREME COURT.—14 S C. R., p. 193, C. D., p. 129.

276 Que lorsqu'il y a imprudence ou faute de la part de la victime de l'accident, cette faute ne peut soustraire le maître ou commettant à la responsabilité qu'il encourt par la loi ; mais cette faute de la victime doit être prise en considération lorsqu'il s'agit d'établir le montant des dommages.—MATHIEU, J.—*St Jean vs Cie de Navigation du Richelieu et d'Ontario*, 11 L. R., p. 381.

277. Que dans une action en dommages contre une corporation municipale pour réclamer des dommages résultant d'un accident causé par le mauvais état des chemins, la Cour, pour l'évaluation des dommages, prendra en considération la difficulté de maintenir les chemins en bon ordre, à cause du mauvais temps et de la saison de l'année.—Q. B.—*Corporation du Canton de Douglas & Maher*, 14 R. L., p. 45.

278. That in cases of personal wrongs the Court will not interpose to grant a new trial on account of the largeness of the damages, unless they are so flagrantly excessive as to afford internal evidence of the prejudice and partiality of the jury.—C. R.—*Laflamme vs Mail Printing & Publishing Co.*, 30 L. C. J., p. 87.—Confirmed in Appeal, June 1888.

279. Unless there be clear proof that the Court below has proceeded upon a principle entirely erroneous, the judicial committee will not, upon a question of damages, alter the amount awarded.—PRIVY COUNCIL.—*Bank of Upper Canada & Bradshane*, 17 L. C. R., p. 273, 1 P. C. App., p. 479.

280. When Defendants conduct was clearly reprehensible, though actual damages may not have been proved, sufficient exemplary damages should be allowed to give the Plaintiff his costs.—Q. B.—*Brossoit & Turcotte*, 20 L. C. J., p. 141.

281. An action for damages was brought for failure to deliver a quantity of wood according to contract. The plaintiff claimed large damages for non-delivery of the wood in the winter, when the price rose very high.—*Held*, that the damage was to be estimated at the time the contract was broken.—TORRANCE, J.—*Laflamme vs Legault*, 3 R. C., p. 72.

282. In an action for damages for the loss of a trunk the plaintiff claimed for his time spent in enquiring after the trunk.—*Held*, that the value of the property lost was the only measure of damages.—MEREDITH, C. J.—*Breton vs Grand Trunk Ry.*, 2 R. C., p. 37.

283. The measure of damage in the case of breach of a notarial contract to manufacture and deliver a carriage within a specified time, does not include loss of profit, by reason of the non-delivery.—C. R.—*Martin vs Lajeunesse*, 18 L. C. J., p. 188.

284. Anguish of mind of the widow of a person killed by an accident may be considered in estimating the amount of damages to be awarded her for the death of her husband,—Q. B.—*Robinson & Canadian Pacific Railway Co.*, M. L. R., 2 Q. B., p. 25.—Reversed in SUPREME COURT.—10 L. N., p. 241, 14 S. C. R., p. 105.

285. Where there is a right of action for a trifling assault and where no material damage is done, and the plaintiff refuses all settlement, and begins and

Digitized by Google

MEASURE OF DAMAGES, (*Continued*) :—

then abandons a prosecution before a magistrate, in order to bring an action of damages, the Court will reduce damages which have no reasonable measure, to such a sum as would be imposed as a fine by a magistrate, with costs against defendant.—Q. B.—*Papineau & Taber*, M. L. R., 2 Q. B., p 107.

286. In the absence of special proof of damage the defendants, a mercantile agency, was condemned to pay $2,000 to the plaintiff for publishing false reports regarding the latter.—LORANGER, J.—*Carsley vs Bradstreet Company*, M. L. R., 2 S. C., p. 33.—Confirmed in Court of Queen's Bench,—Q. B.—M. L. R., 3 Q. B., p. 83.

287. The insufficiency of the damages awarded in a libel suit is not a ground for ordering a new trial. Where the jury have given the plaintiff some damages, however insignificant, the defendant cannot move that judgment be entered for the plaintiff on such verdict.—C. R.—*Dixon vs Mail Printing & Publishing Co.*, M. L. R., 1 S. C., p. 489.

288. Que l'entrepreneur qui se sert d'une machine défectueuse dans l'exécution des travaux qu'il a entrepris, est responsable des dommages qui sont causés à ses employés par cette machine ; mais que la condamnation aux dommages doit être mitigée, si l'employé a commis une imprudence, en faisant, pour l'entrepreneur, des travaux qui l'exposaient et qu'il n'était pas chargé de faire.—MATHIEU, J.—*Daoust vs Laverdure*, 14 R. L., p. 279.

289. When an employee in the discharge of his duties has done something which the generality of men would have done under like circumstances, he is not in fault, and such conduct does not afford a reason for reducing the amount of the damages which he is entitled to recover from his employers, on the pretext of contributory negligence.—C. R.—*Cossette vs Leduc*, 6 L. N., p. 181.

290. Where a collision occured between two vehicles and both drivers were in fault, but it appeared that the accident might neverthless have been averted by ordinary care on the part of one of the drivers, who did not stop, when requested, the latter was held liably in mitigated damages only.—TORRANCE, J.—*Therien vs Morrice*, 6 L. N., p. 111.

291. Where the appellant was obliged to return the respondent certain railway bonds, but was unable to do so owing to his having sold them, it was held that he should be condemned to pay the actual value thereof at the time the bonds were acquired by him and not their *par* or nominal value.—Q. B.—*Senécal vs Hatton*, M. L. R., 1 Q. B., p, 112, 7 L. N., p. 414.—Confirmed in PRIVY COUNCIL.—10 L. N., p. 50. (Not reported in App. Cas.)

292. Que le vendeur de choses mobilières qui se réserve le droit de racheter les choses vendues, pendant un certain temps, pour un prix déterminé, aura, contre l'acheteur, s'il lui offre, dans le délai fixé, le montant convenu, un recours en dommage, si ce dernier les revend à un tiers, et que la mesure de dommage sera le prix reçu par le second acquéreur.—Q. B.—*McDougall & McGreevy*, 16 R. L, p. 1, 14 Q. L. R., p. 30.

293. The damages contemplated by section 13 of the Railway Act (respecting the responsibility of a Railway Company for damage done to cattle through neglect of the company to fence its line) are actual damages, and the expense and trouble a proprietor of cattle incurs in herding his cattle before the accident, to prevent their escaping on to the railway line, on account of absence of fences,

Digitized by Google

MEASURE OF DAMAGES, (*Continued*) :—

is not a damage that can be recovered from the Railway Company.—DOHERTY, J.—*Fouchon vs Ontario & Quebec Ry. Co.*, 11 L. N., p. 74.

294. That although no special or material damages be proved, yet if the expressions complained of be false and slanderous and in their nature calculated to injure the plaintiff's character and she thereby suffer damage and be wounded and injured in her feelings, the Court will award damages.—Q. B.—*Fitzgibbons & Woolsey*, 13 Q. L. R., p. 49.

295. That damages as *solatium dolores* may be allowed to the adult children of a parent killed by an accident without proof of special damage.—Q. B.—*City of Montreal & Labelle*, 15 R. L., p. 474.—PAPINEAU, J.—M. L. R., 2 S. C., p. 56.

296. That in estimating the amount of damages suffered, it is the duty of the Court, in a case of libel, to take into account the position and standing of the plaintiff. That when there has been a long delay in obtaining judgment in such cases, through no fault of the plaintiff, during which he was prevented from obtaining justice, this is an aggravation of the injury and the Court would take this into consideration in estimating the amount of damages suffered.—TASCHEREAU, J.—*Brown vs City of Montreal*, 31 L. C. J., p. 138.

297. Qu'un jugement accordant au demandeur $20.00 de dommages et $20.00 de frais, mais condamnant le dit demandeur à payer au défendeur la différence des frais, c'est-à-dire, tous ses frais moins $40.00, est erroné en autant qu'il détruit virtuellement l'effet du jugement prononcé en faveur du demandeur.—C. R.—*Primeau & Demers*, M. L. R., 3 S. C., p. 88.

298. Que les dommages que l'on peut réclamer d'une personne coupable de vol ou de quasi-délit ne sont que ceux qui en résultent directement et en sont une suite immédiate et non pas ceux dont la faute n'a été que l'occasion indirecte.—MATHIEU, J.—*Kimball & City of Montreal*, M. L. R., 3 S. C., p. 131.

299. The measure of damages for infrigment of a patent of invention by using a patented machine purchased of a manufacturer of the invention and not the inventor, is not the profit which the purchaser derived from the use of the patent. The true measure is the loss suffered by the patentee.—Q. B.—*Pinkerton & Côté*, M. L. R., 3 Q. B., p. 133.

300. Que dans le cas de dommages résultant de la négligence du défendeur, quand il n'y a pas de malice de sa part, il n'est pas passible de dommages-intérêt exemplaires, mais seulement des dommages réels que sa négligence aurait causés. —Q. B.—*Stephens & Chaussé*, M. L. R., 3 Q. B., p. 270.—Confirmed in SUPREME COURT.—11 L. N., p. 90.

301. In this case the profits made by the the Defendants were not a proper measure of the damages due for the infringement of a patent and that, as the evidence furnished no means of accurately measuring the damages, substantial justice would be done by awarding $100.00. —Q. B.—*Collette & Lasnier*, 32 L. C. J., p. 24.—Confirmed in the SUPREME COURT.—13 S. C. R., p. 563.

302. The measure of damages sustained in the case of violation of copyright is the amount realized by the party guilty of infringement.—ANDREWS, J.—*Bernard vs Bertoni*, 14 Q. L. R., p. 219.

303. Qu'en droit on peut actionner pour dommages-intérêts résultant tant du tourment moral que des souffrances corporelles causés par des voies de fait sur la personne.—WURTELE, J.—*Auclair vs Bastien*, M. L. R., 4 S. C., p. 74.

See also cases nn. 241 & 243 *ante* and those noted at C. C. 1072 et seq.

Digitized by Google

1054. He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care ;

The father, or, after his decease, the mother is responsible for the damage caused by their minor children ;

Tutors are responsible in like manner for their pupils ;

Curators or others having the legal custody of insane persons, for the damage done by the latter ;

Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care.

The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.—*ff* L. 1, § *Si familia furtum fecisse dicatur ;* 7, 6, lib. 47, tit. 6, L. 5 ; Pothier, *Oblig.*, 121, 122 ; Nouv. Den., vo. *Delit*, § 6, no 5 ; 4 Zachariæ, p. 24, note 8 ; 11 Toullier, 260 et seq. to 278, also 282 et seq ; C. N., 1384. [I. 61.]

Amendments : As to the liability incurred by the owners of vessels or rafts for damages to person or property by reason of collisions, &c., see the Act intituled " An Act respecting the Navigation of Canadian Waters."—R. S. C., cap. 79.

The Act intituled the Quebec License Law of 1878 and amending Acts makes persons selling liquor liable in certain cases for the acts of persons intoxicated by consuming the same.—Q. 41 Vict., cap. 3, ss. 95 et seq.

DECISIONS :—ACCIDENTS TO EMPLOYEES.—1. An employee of a Railway Company has no action against the Company for damages where the injury is caused by the negligence of a fellow servant, while both are acting in pursuance of a common employment.—MONK, J.—*Bourdeau vs Grand Trunk Ry. Co.*, 2 L. C. L. J., p. 186.

2. A servant has no action of damages against his employer for any injury he may sustain through the negligence of his fellow servants.—BADGLEY, J.—*Fuller vs. Grand Trunk Ry. Co.*, 1 L. C. L. J., p. 68.

3. The rule which makes a master responsible for the negligence of his servant, does not apply where the servant, at the time, is absent from service and is engaged about his own affairs.—C. R.—*Bellhouse vs Laviolette*, 7 L. N., p. 84.

4. Le maître est responsable à son employé du dommage qui lui advient par suite d'une installation vicieuse des machines ou appareils de son établissement et la connaissance que l'employé aurait pu avoir du danger n'exonère pas le maître.—Lorsque l'employé a fait ce qu'auraient fait la plupart des hommes, il n'est pas en faute, et il n'y a pas lieu à réduire son indemnité pour négligence contributive.—C. R.—*Cossette vs Leduc*, 6 L. N., p. 181.

Digitized by Google

5. Que l'ouvrier blessé dans l'exécution d'un travail qui ne devient dangereux que par l'inattention de celui qui l'exécute, n'est pas fondé à réclamer des dommages-intérêts au maître d'atelier qui l'en avait chargé, si, connaissant depuis longtemps toutes les précautions à prendre, il n'a pu être victime de l'accident que par l'effet de sa faute et de son imprudence.—MATHIEU, J.—*Sarault vs Viau*, 11 R. L., p. 217.

6. Que l'entrepreneur qui, dans l'exécution des travaux qu'il a entrepris, se sert d'une machine défectueuse, est responsable des dommages qui sont causés à ses employés par cette machine; mais que la condamnation aux dommages doit être mitigée, si l'employé a commis une imprudence, en faisant, pour l'entrepreneur, des travaux qui l'exposait et qu'il n'était pas chargé de faire.—MATHIEU, J.—*Daoust vs Laverdure*, 14 R. L., p. 279.

7.—An employee, whilst discharging rails from a steamer, got injured. *Held:* That, under the evidence, contributory negligence was proved, and that the employer was not responsible.—Q. B.—*Desroches & Gauthier*, 3 Q. B. R., p. 25, 5 L. N. p. 404.

8. Where a servant meets with an accident while engaged in the ordinary duties of his employment and the accident is not the result of any fault or negligence on the part of the employer or of those for whom he is responsible, the servant or his representatives has no right to recover damages from the employer. —Q. B.—*Cie. de Nav. du Richelieu et Ontario & St. Jean*, M. L. R., 1 Q. B., p. 252, 28 L. C. J., p. 91.—MATHIEU, J.—11 R. L., p. 381.

9. Que le maître n'est responsable du dommage causé à son employé que lorsque ce dommage est arrivé par sa faute ou son fait, soit par imprudence, négligence ou inhabilité, et que, dans cette cause, il n'y a aucune preuve que l'accident est arrivé, soit par la faute ou le fait de l'appelante.—Q. B.—*St. Lawrence Sugar Refining Co. & Campbell*, 4 Q. B. R., p. 186, M. L. R., 1 Q. B., p. 290, 29 L. C. J., p. 174.

10. Pendant que l'intimé travaillait pour l'appelant à décharger du charbon du steamer "Polino," les appareils se sont rompus et ont blessé l'intimé qui réclame, par son action, les dommages qui lui ont été causés par cet accident.—JUGÉ.—Que la preuve établit que l'accident est arrivé par l'insuffisance des appareils fournis par l'appelant pour décharger le charbon du steamer, sans faute de la part de l'intimé, et que sous ces circonstances, l'appelant est responsable des dommages que l'intimé a soufferts.—Q. B.—*Ross & Langlois*, 4 Q. B. R., p. 187, M. L. R., 1 Q. B., p. 280.

11. M., the husband of the plaintiff, was employed by the defendant, the master of a steamship, to assist in unmooring the steamship, then lying at her wharf in Montreal, and about to put to sea. While M. was standing ready to cast off the stern hawser from the post, the hawser snapped, and M. was fatally injured. —*Held*:—That the presumption was that the rope was insufficient for the purpose for which it was being used, or that the ship was unskilfully handled, and, in either case, the master of the ship was responsible.—Q. B.—*Corner & Byrd*, M. L. R., 2 Q. B., p. 262.

12. An employer is responsible for the damages suffered by an employee through the negligence or want of skill of a fellow workman. Anguish of mind of the widow sueing for damages for the loss of her husband, may be considered in estimating such damages.—Q. B.—*Robinson & Canadian Pacific Ry. Co.*, M. L. R.,

Digitized by Google

2 Q. B., p. 25. (Reversed in Supreme Court as to the question of *solatium* :—10 L. N., p. 324, 14 S. C. R., p. 105.)

13. Where a brick fell and injured another workman, it was held that, under the circumstances of the case, the contractor was responsible.—Q. B.—*Evans & Monette*, 30 L. C. J., p. 204, 4 Q. B. R, p. 303, M. L. R., 2 Q. B., p. 243.

14. A gang of men engaged by a Railway Company were proceeding on a construction train, to the place where they were about to be employed. Platform cars were provided by the Company for their transport, but the men, of whom the Plaintiff was one, mounted upon a car laden with lumber, and the lumber giving away, the Plaintiff and other men were injured. *Held:* That it was the duty of the Company's officials to have prevented the workmen from riding in such a dangerous position, or, at least, to have warned them very clearly of their peril, and the Company was held responsible for the damages suffered by the men.—Q. B.—*Canadian Pacific Ry. Co, & Goyette*, 30 L. C. J., p. 207. M. L. R., 2 Q. B., p. 310.

15. Que le maître est responsable du damage causé par son ouvrier à un autre ouvrier dans l'exécution des fonctions auxquelles il est employé. Que par suite, il est responsable du dommage causé à un de ses employés, par l'écroulement d'un échafaud construit par un autre de ses ouvriers, sur son ordre.—MATHIEU, J.—*Bélanger & Riopel*, M. L. R., 3 S. C., p. 198.—Confirmed by the Court of Review.—M. L. R., 3 S. C., p. 258.

16. The plaintiff was employed by the defendant in hoisting ice into the abbatoirs at Montreal East and the rope to which was attached the ice-tongs broke, whereby the plaintiff's arm was broken. He sued for damages and was awarded $100.—C. R.—*Perrault vs Hénault*, 31 L. C. J., p. 287.

17. Que l'ouvrier blessé dans un travail dangereux, mais dont les dangers sont inhérents à sa profession, ne peut actionner l'entrepreneur en responsabilité, si aucune faute n'est imputable à celui-ci.—Qu'il n'y a pas imprudence à employer comme apprenti couvreur un jeune homme de seize ans.—DAVIDSON, J.—*Lavoie vs Drapeau*. 31 L. C. J., p. 331, M. L. R., 3 S. C. p. 304.

18. Que le journalier qui, en aidant à transporter des effets sur un camion, sous les ordres de l'employé d'une compagnie, et qui est blessé, par suite de la rupture du camion et de la chute des effets transportés, a un recours en domma, ge contre la compagnie qui faisait transporter ces effets.—Q. B.—*Allan & Pratt*-15 R. L., p. 291, M. L. R., 3 Q. B., p. 7.

MISCELLANEOUS :—19. A proprietor is not responsible for damages caused to a neighbouring proprietor by explosions in quarrying carried on on his property by his tenant.—BADGLEY, J.—*Vannier vs Larchevêque*, 2 L. C. J., p. 220.

20. A party is responsible for the negligence of his contractor, where he himself retains control over the contractor and over the mode of work. The relationship between them is then similar to that of master and servant.—Q. B.—*Harold & Corporation of Montreal*, 3 L. C. L. J., p. 88.

21. An employer or parent is responsible for a trespass committed by his children, or by persons employed by him or under his control, where he fails to establish that he was unable to prevent the act.—JOHNSON, J.—*Gravel vs Hughes*, 7 L. N., p. 32.

22. A shutter from an upper story slipped off its hinges while the Defendant's servant was opening it; the Court held, that although there was no gross negligence on the part of the servant, yet the employer was responsible for the

Digitized by Google

injuries sustained by the Plaintiff, in consequence of the shutter falling on her.—JOHNSON, J.—*Gouletvs Stafford*, 4 L. N., p. 357.

23. That the parent is responsible for the act of his minor son, whether done in his presence or not.—Q. R.—*Lussier & Chayeth*, 30 L. C. J., p. 166.

24. That a tenant is not under the control of his landlord, within the meaning of C. C. 1054, so as to make the landlord responsible for the negligence of the tenant in the use of the leased premises and the proprietor is not responsible for loss occasioned by sparks from the furnace of a chimney of a tannery erected and leased by him, where there is no defect in the construction of the furnace.—Q. B.—*Dufour & Roy*, 11 Q. L. R., p. 192, 8 L. N., p. 75.

25. Que lorsqu'un fils, propriétaire d'une terre, place son père, devenu vieux et incapable de gagner sa vie à la journée, sur une terre pour la cultiver, pour y continuer les défrichements commencés, et pour fournir à ce dernier les moyens de subsistance, les relations entre le fils et le père sont celles de commettant à préposé, et que l'incendie allumée imprudemment par le père dans un abattis, sur la terre, engage, quant aux dommages causés par cet incendie à un voisin, non seulement la responsabilité du père, l'auteur direct du quasi-délit, mais aussi celle du fils.—CHAGNON, J.—*Lamothe vs Bissonette*, 14 R. L., p. 129.

26. Des clôtures ont été enlevées en 1874 et 1875, par Donnelly, qui avait entrepris de faire, à forfaix, la partie de l'aqueduc où ces clôtures se trouvaient, ainsi que par d'autres personnes. En 1879, l'appelant a porté cette action pour la valeur des clôtures enlevées par Donnelly et autres, contre la Cité de Montréal, qui avait employé Donnelly.—JUGÉ. Que la Cité de Montréal n'est pas responsable des actes de Donnelly, qui n'était pas son préposé, mais un entrepreneur ordinaire et à forfaix des travaux de l'aqueduc.—Q. B.—*Robert & La Cité de Montréal*, 2 Q. B. R., p. 68.

27. The tenant of an office in the third story of a building, in which the landlord had placed an elevator for the use of his tenants, went towards the door of the elevator and, seeing it open, advanced to enter, but instead of putting his foot on the floor of the elevator, which was not there, he fell into the cellar and was seriously injured. The boy in charge, an employee of the landlord, had left the elevator with the door open and gone to his lunch, leaving a substitute. The Court of first instance awarded $5000 damages against the landlord, but the Court of Queen's Bench reduced the amount to $3000, which judgment the Supreme Court confirmed, holding also that although the sum of $5000 awarded in a case like the present could not be said to include vindictive damages, the judgment of the Court of first instance could not be restored, there being no cross-appeal.—SUPREME COURT.—*Stephens & Chaussé*. 11 L. N., p. 90.—Q. B.—M. L. R., 3 Q. B., p. 270.

28. Where a chemist leaves his shop in charge of an apprentice not qualified under the Quebec Pharmacy Act of 1885, sec. 22, to mix prescriptions, he is guilty of *faute* and is liable in damages towards a person injured by an explosion of chemicals during his absence, such explosion having resulted from the act of the apprentice.—DAVIDSON, J.—*Laskey & Lyons*, M. L. R., 4 S. C., p. 4.

See also cases noted under various headings at C. C., 1053.

1055. The owner of an animal is responsible for the damage caused by it, whether it be under his own care or under that of his servants, or have strayed or escaped from it.

Digitized by Google

He who is using the animal is equally responsible while it is in his service.—*ff* L. 1, §§ 4, 7 ; L. 5, *Si quadrupes pauperiem* ; Domat, liv. 2, tit. 8, sec. 2, *in principio*, et nn. 4, 5, et nn. 8 et seq. to 12 ; C. N., 1385. [I. 61.]

The owner of a building is responsible for the damage caused by its ruin, where it has happened from want of repairs or from an original defect in its construction.—*ff* L. 1, 2, 7, *De damno inf.*; Domat, liv. 2, tit. 8, sec. 3, nn. 1 et seq.; C. N., 1386. [I. 63.]

DECISIONS :—1. An *action d'injure* lies for exciting a dog to bite the plaintiff's horse, whereby the horse was injured and his cart broken.—K. B.—*Davidson vs Cole*, 1 R. de L., p. 503.

2. The proprietor of a hive of bees is responsible for the death of a horse caused by stings of the bees.—MAGISTRATE'S COURT.—*Tellier vs Pellant*, 5 R. L., p. 61.

3. In an action for damages in consequence of plaintiff s child being severely bitten by defendant's dog which was trained and kept as a fighting dog and suffered to run unmuzzled, exemplary damages will be awarded.—MONDELET, C. J.—*Falardeau vs Couture*, 2 L. C. J., p. 96.

4. Le propriétaire d'un animal loué à une personne qui n'est pas son domestique, son agent ou préposé et qui conduit seul tel animal, n'est pas responsable du dommage que cet animal cause, s'il n'est prouvé que c'est par le mauvais caractère de cet animal que le dommage a été causé. La personne qui a ainsi loué un animal est seule responsable du dommage causé par lui, si cet animal est doux et tranquille, et si le dommage causé l'a été sans la faute ou la négligence du propriétaire ou des employés, et si l'animal n'était pas sous la garde du propriétaire ou des domestiques.—Q. B.—*Béliveau & Martineau*, 4 R. L., p. 691.—BERTHELOT, J.—15 L. C. J., p. 59. (But see case n. 15 *supra*.)

5. When the defendant placed his horse in a stall adjoining the stall in which was the plaintiff's horse, the defendant having no right to occupy said stall, and his horse kicked the plaintiff's horse, so badly injuring it that it had to be shot, the defendant was held liable in damages.—TASCHEREAU, J.—*Bérubé vs Ouellet*, 4 L. N., p. 343.

6. Que le propriétaire d'un étalon, lorsqu''il loue les services de cet étalon, est tenu de prendre tous les soins ordinaires pour éviter des dommages, et qu'en cas où la jument servie meurt par la rupture du gros intestin, le propriétaire de l'étalon sera responsable du prix de la jument, s'il ne montre qu'il a pris tous les soins et l'attention requise.—DOHERTY J.—*Bergeron vs Brassard*, 10 R. L., p. 21.

7. Le cheval et la voiture de l'intimé vinrent se heurter, sur la voie publique, contre celle de l'appelant, avec assez de violence pour que l'épouse de ce dernier fût renversée de sa voiture et sévèrement blessée. JUGÉ: Que la collision est due à la faute ou à l'imprévoyance de l'intimé, et que l'appelant a droit à des dommages.—Q. B.—*Gougeon & Contant*, 4 Q. B. R., p. 30.—JOHNSON, J.—5 L. N. p. 182.

8. Que le propriétaire d'un cheval vicieux ou difficile à conduire, est responsable des dommages causés par ce cheval, aux personnes qui se trouvent dans une autre voiture allant dans la même direction.—Q. B.—*Mercier & Guay*, 10 R. L., p. 598.

Digitized by Google

9. Where a collision occurred between two vehicles, and both drivers were in fault, but the accident might have been averted by ordinary care on the part of one, who did not stop when requested, the latter was held liable in mitigated damages.—TORRANCE, J.—*Thérien vs Morrice*, 6 L. N., p. 110.

10. When an employee is bitten by the ferocious dog of his master, which is allowed by him to go at large, without any provocation by the employee, the master is liable in damages, notwithstanding that such employee had been warned of the disposition of the dog to bite, and that he should try to avoid him. —C. R.—*Auprix vs Lafleur*, 25 L. C. J., p. 251.

11. The proprietor of a stallion is not responsible for the death of a mare, which was the result of an error *de voie* committed by the stallion at the time of the connection, if it be not proved that the error had for its cause some fault on the part of the proprietor of the stallion or the servants of the proprietor.—C. R. —*Brouillard vs Coté*, 30 L. C. J., p. 269, 15 R. L., p. 715.

12. Que le propriétaire d'un étalon est responsable pour la perte d'une jument arrivée par une *erreur de voie* commise par le dit étalon. Qu'il y a présomption de faute, ou imprudence de la part du propriétaire de l'étalon et que l'*onus probandi*, d'aucune faute, négligence, impéritie ou imprudence incombe au propriétaire de l'étalon.—TASCHEREAU, J.—*Rodrigue vs Leduc*, 16 R. L., p. 295.

13. When the Plaintiff left his horse unattended in a public street, and the Defendant was carting iron in that street, thereby causing a noise which startled the Plaintiff's horse and caused it to bolt and to damage, it was held that no action would lie against the Defendant.—JOHNSON, J.—*Mc Willie vs Goudron*, 30 L. C. J., p. 44.

14. Que dans une action pour dommages causés par un cheval qui avait pris le mors aux dents, le défendeur, propriétaire du cheval, a le droit avant de plaider, d'exiger du demandeur le détail des dommages réels qu'il réclame, (*bill of particulars.*) Que dans une action de cette nature, le défendeur, avant de plaider, peut obtenir de la Cour, la nomination d'un ou de plusieurs médecins pour constater la gravité des blessures reçues, et quels dommages il en résultera à la demanderesse.—MATHIEU, J.—*Lemieux vs Phelps*, M. L. R., 1 S. C., p. 305.

15. That an hotel-keeper, from whom a guest hires a horse and vehicle, for the purpose of taking a drive, is not responsible for the negligence of his guest while driving.—Q. R.—*Béliveau & Martineau*, M. L. R., 2 Q. B., p. 133. (But see case n. 4 *ante.*)

16. Que le conducteur d'une voiture qui, en traversant une des rues principales de la Cité de Montréal, ne met pas son cheval au pas, contrevient aux réglements de la Cité de Montréal, et s'il frappe quelqu'un il est présumé en faute et est responsable des dommages.—MATHIEU, J.—*Roberts vs Bastien*, 16 R. L., p. 64, M. L. R., 4 S. C., p. 45.

17. La responsabilité qui incombe au maître d'un animal pour le dommage causé par ce dernier procède d'une présomption de faute de la part du maître de cet animal, présomption qui ne peut être détruite que par la preuve à la charge du dit propriétaire soit d'un cas fortuit ou de cas majeur, soit d'une faute imputable à la partie lésée.—COUR D'APPEL DE RIOM.—*Justin vs Société des Forges de Chatillon*, 11 L. N., p. 181.

18. A plea to an action for damages resulting from the bite of a dog, alleging that the accident arose from the fault and imprudence of the Plaintiff, is a good defence.—C. R.—*Mainville vs Hutchins*, 31 L. C. J., p. 58.

Digitized by Google

1056. In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.

In the case of a duel, action may be brought in like manner not only against the immediate author of the death, but also against all those who took part in the duel, whether as seconds or as witnesses.

In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive.

These actions are independent and do not prejudice the criminal proceedings to which the parties may be subject.

Amendment : The right of action against the master of an inn, restaurant or any other house, where intoxicating liquors are sold, for damages towards the representatives of a person who shall have become intoxicated there by means of liquors delivered to him by the said master or employer and who, by reason of his drunkenness, shall have committed suicide or died from some accident occasioned by such intoxication, lasts but three months from the date of death.—Q. 41 Vict., cap. 3, ss. 99 and 100.

DECISIONS:—1. In an action by a tutrix to minors for damages, in consequence of the death of their father through the negligence of the defendant, the demand is subject to the prescription of one year.—MONDELET, J.—*Filiatrault vs Grand Trunk*, 2 L. C. J., p. 97.

2. The claim for damages for the death of a person resulting from a quasi-offence, forms no part of his succession, and by article 1056 C. C., under which alone an action for such a claim will lie, the brothers and sisters of deceased have no right of action.—MCCORD, J.—*Ruest vs Grand Trunk Railway Co.*, 4 Q. L. R., p. 181.

3. Que lorsqu'un homme est tué par un accident, l'action qui compète à sa femme et à ses enfants peut être intentée par la veuve sans joindre les enfants dans l'action, et que la Cour n'est pas alors obligée de répartir entre la veuve et les enfants le montant de la condamnation.—Q. B.—*Compagnie du Grand Tronc & Godbout*, 6 Q. L. R., p. 63.

4. A direction to the jury that anguish of mind suffered by a loss of a husband, may properly be taken into consideration by them in estimating the damages which should be allowed to the widow, is not erroneous.—Q. B.—*Robinson & Canadian Pacific Railway Co.*, M. L. R., 2 Q. B., p. 25.—Reversed in Supreme Court.—14 S. C. R., p. 105, 10 L. N., p. 324.

5. Que lorsqu'une personne est morte par suite d'un accident causé par le mauvais état des rues, les enfants et héritiers de cette personne, lors même qu'ils

Digitized by Google

n'auraient prouvé aucun dommage, ont droit d'obtenir de la Cité de Montréal une certaine somme d'argent, par forme de consolation et soulagement.—PAPINEAU, J.—*Labelle vs Cité de Montréal*, M. L. R., 2 S. C., p. 56.

See also cases noted, under the title of Measure of Damages, at C. C. 1053.

CHAPTER FOURTH.

OF OBLIGATIONS WHICH RESULT FROM THE OPERATION OF LAW SOLELY.

1057. Obligations result in certain cases from the sole and direct operation of law, without the intervention of any act, and independently of the will of the person obliged or of him in whose favor the obligation is imposed.

Such are the obligations of tutors and other administrators who cannot refuse the charge cast upon them ;

The obligation of children to furnish the necessaries of life to their indigent parents ;

Certain obligations of owners of adjoining properties ;

The obligations which in certain cases arise from fortuitous events ;

And others of a like nature.—Domat, liv. 2, tit. 9 ; Pothier, *Oblig.*, 123 ; 5 Marcadé, p. 238 on art. 1370 ; 11 Toullier, 308, 309, 310 ; C. N., 1370. [I. 63.]

CHAPTER FIFTH.

OF THE OBJECT OF OBLIGATIONS.

1058. Every obligation must have for its object something which a party is obliged to give, or to do, or not to do.—*ff* L. 3, *in pr., De obligat. et action ;* Pothier, *Oblig.*, 53, 129 ; C. N., 1126. [I. 63.]

1059. Those things only which are objects of commerce can become the object of an obligation.—*ff* L, 83, § 5, *De verb. oblig ;* Pothier, *Oblig.*, 135 ; C. N., 1128. [I. 63.]

1060. An obligation must have for its object something determinate at least as to its kind.

The quantity of the thing may be uncertain, provided it be

Digitized by Google

capable of being ascertained.—*ff* loc. cit., L. 94, 95 ; Pothier, no 131 ; C. N., 1129. [I. 63.]

1061. Future things may be the object of an obligation.

But a person cannot renounce a succession not yet devolved, nor make any stipulation with regard to it, even with the consent of him whose succession is in question; except by marriage contract.—Cod., L. 15, *De pactis*; Dig., *loc. cit.*, L. 61; Pothier, 132; C. N., 1130. [I. 63.]

1062. The object of an obligation must be something possible and not forbidden by law or good morals.—*ff* L. 1, 85, *De reg. jur. Impossibilium nulla obligatio est*; Pothier, 136, 137. [I. 63.]

DECISIONS :—A subscription note given to a municipal corporation, to aid in the erection of a public market, is not a contract or agreement contrary to good morals.—Such contract or agreement is one that the parties might lawfully make, and is not beyond the powers of a corporate body.—RAMSAY, J.—*Corporation of the Village of Waterloo vs Girard*, 16 L. C. J., p. 106.

2. That an agreement to suppress a prosecution for a crime, although not a felony, if a misdemeanour of a public nature, is illegal and not a valid consideration for a promise to pay money.—MEREDITH, C. J.—*Couture vs Marois*, 5 Q. L. R., p. 96.

3. Que la vente par un médecin de sa clientèle, avec promesse de présenter l'acquéreur à ses pratiques et de leur faire accepter autant qu'il le pourrait, et, à cet effet, la convention par le vendeur de pratiquer pendant six mois pour le compte et profit de l'acquéreur, et celle de cesser de pratiquer dans certaines parties de la même ville, sont des conventions, les premières de faire, et la dernière de ne pas faire, qui, même si la vente d'une clientèle de médecin était illégale, peuvent séparément et conjointement être l'object d'un contrat et d'une obligation par l'acquéreur de payer le prix stipulé.—CASAULT, J.—*Verge vs Verge*, 14 Q. L. R., 225.

See also cases noted at C. C. 990.

CHAPTER SIXTH.

OF THE EFFECT OF OBLIGATIONS.

SECTION I.—GENERAL PROVISIONS.

1063. An obligation to give involves the obligation to deliver the thing and to keep it safe until delivery.—*ff* L. 11, §§ 1, 2, *De action. empti et venditi*; Pothier, *Oblig.*, 142; C. N., 1136. [I. 65.]

Digitized by Google

1064. [The obligation to keep the thing safely obliges the person charged therewith to keep it with all the care of a prudent administrator.]—*ff* L. 5, § 2, *commodati* ; L. 17, *De periculo et commodo rei venditæ* ; Pothier, *Oblig.* 142 ; Domat, liv. 1, tit. 1, sec. 3, n. 8 ; C. N. 1137. [I. 65.]

1065. Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense, or that the contract from which the obligation arises be set aside ; subject to the special provisions contained in this code, and without prejudice, in either case, to his claim for damages.—*ff* L. 75, § 7, *De verb. oblig.*, *ff* L. 13, *in fine, De re judicatâ* ; Pothier, 148, 157, 158 ; Domat, liv. 1, tit. 2, sec. 2, nn. 19, 20 ; C. N., 1142, 1144. [I. 65.]

DECISIONS :—1. Que dans le cas d'une obligation de faire, le défaut, par le débiteur, d'exécuter telle obligation donne au créancier le droit d'opter de suite pour des dommages-intérêts.—Que le montant alloué à tel titre, porte intérêt à compter du dernier jour du délai accordé par la mise en demeure, s'il en a été fait une.—Que, spécialement, le défaut d'exécuter l'obligation de faire un certain chemin déterminé, donne au créancier un droit à des dommages-intérêts contre son débiteur.—Q. B.,—*Compagnie du Chemin de Fer Québec Central & Letourneau* 14 R. L., p. 324.

2. Que le défendeur, ayant loué au demandeur une maison, le demandeur est fondé à exiger du défendeur l'accomplissement de cette obligation, et sur son refus, à se pourvoir pour en obtenir l'exécution sans l'autorité de la Cour.—C. R.—*Morgan vs Dubois*, 32 L. C. J., p. 204.

1066. The creditor, without prejudice to his claim for damages, may require also, that any thing which has been done in breach of the obligation shall be undone, if the nature of the case will permit ; and the court may order this to be effected by its officers, or authorize the injured party to do it, at the expense of the other.—Authorities under preceding article. C. N., 1143. [I. 65.]

SECTION II.—OF DEFAULTS.

1067. The debtor may be put in default either by the terms of the contract, when it contains a stipulation that the mere lapse of the time for performing it shall have that effect ; or by the sole operation of law ; or by the commencement of a suit, or a demand which must be in writing unless the contract itself is verbal.—*ff* L. 23, *De verb. oblig* ; Cod., L. 12, *De contrahendâ et committendâ stipulatione* ; Pothier, *Oblig.*, 144, 145, 147 ; 5 Guyot, Rep. *Vo. Demeure*, p. 396 ; 6 Toullier, n. 248, 249, 250, 251, 252, 253 ; 10 Duranton, n.

Digitized by Google

441 et seq ; Lacombe, Jurisp. civile, p. 124, vo *Retardement* ; C. N., 1139. [I. 65.]

DECISIONS :—1. La prestation suivante portée dans un acte de donation, " de nourrir le donateur à son pot et feu, de le chauffer et éclairer," n'est pas productive d'arrérages ; et une mise en demeure légale doit être faite à la partie obligée, pour la contraindre au service de cette prestation, le défendeur ayant toujours été prêt à se conformer à son obligation.—MONK, J.—*Chénier vs Coutlée*, 7 L. C. J., p. 291.

2. In this case, which was in ejectment upon a verbal lease, the court was of opinion that the *motif* of the judment could not be sustained. The *motif* was that the plaintiff had made no legal proof of a *mise en demeure*. The question was as to occupation of a farm under a verbal agreement and whether at the expiration of the year the defendant had sufficient notice to leave and quit the property. The judgment was grounded upon the *motif* that there was no *mise en demeure*. Now the Court of Review was of opinion that the notice was sufficient. It was found that a verbal notice was given, and that fact was admitted by the defendant. The judgment must be reversed.—C. R.—*Molleur vs Favreau*, 1 L. C. L. J., p. 28.

3. The plaintiff, lessee, sued his lessor to compel him to fulfil one of the conditions of the lease, under which he was bound to provide materials for keeping the fences in good order. The action was instituted four days after notice in writing had been served upon the lessor calling upon him to do the work. The judgment condemned the defendant to provide the materials within fifteen days from date of judgment ; in default of his so doing, the plaintiff was authorized to provide the materials at the defendant's expense.—*Held*, that the notice four days before suit was sufficient.—Q. B.—*Prévost & Brien*, 2 L. C. L. J., p. 82.

4. La demande de paiement faite de la part d'un créancier par l'entremise d'une personne inconnue au débiteur, et non munie d'une procuration, n'est pas une mise en demeure, quand le débiteur ne nie pas devoir, mais refuse seulement de payer à cette personne.—MEREDITH C. J.—*Gagnon vs Robitaille*, 4 Q. L. R., p. 186.

5. The Respondent had obtained a judgment against the Appellant and had registered the same against the real estate of the Appellant. The latter paid the amount of the judgment and, without putting the Respondant *en demeure* to give a quittance and discharge of the mortgage, sued the Respondent to compel him to give a certificate of discharge. It was held that the action was premature as the right of action only arose on the Respondant's refusal to grant such discharge when demanded. Q. B.—*Gagnon & Clouthier*, 3 R. C., p. 50.

6. Where the Appellant agreed to pay a certain sum to the Respondents when he should have done a certain act, it was held to be necessary to put him judicially *en demeure* to do the act before the right to receive the money could be sued on.—Q. B.—*Beaudry & Curé vs Marg. de l'Œuvre et Fabrique de la Par. Notre-Dame de Montréal*, 3 L. N., p. 218.

7. Where there was a clause in a deed of sale of an immoveable, of which the purchaser took possession, that if the payments thereon were not made at the proper times, the property should revert to the vendor, and that past payments should be forfeited, the condition was held to be legal and valid.—SUPREME COURT.—*Grange & McLennan*, 9 S. C. R., p. 385, C. D. p. 462, 28 L. C. J., p. 69, 7 L. N., p. 407.—Q. B.—6 L. N., p. 138.

8. Que dans une action sur billet à demande, la simple demande de paie-

Digitized by Google

ment, par n'importe qui, même sans montrer le billet et sans l'avoir, est une mise en demeure suffisante en loi.—CASAULT, J.—*Marcotte vs Falardeau*, 6 Q. L. R., p. 296.

9. Where, in the deed of sale of an immoveable, there is a resolutive clause to the effect that a failure to pay on the appointed day, any one of the instalments of the price of sale should operate *de plano* as a rescission of the contract of sale and that the vendor should, in such case, have the right, without being obliged to have recourse to law, to resume possession of the immoveable, it was held that, even on the supposition of the contract being *plano jure* null, the right of re-entering into possession cannot be exercised by a person not a party to the contract, but to whom the price of sale had been made payable.—C. R.—*Nolet vs Boucher*, 10 L. N., p. 66.

10. Que lorsque le contrat recule l'exigibilité du paiment jusqu'à l'accomplissement d'un fait dépendant de la volonté du débiteur, le créancier ne peut pas, sans aucune fixation de délai et sur sommation notariée du débiteur d'accomplir le fait et de payer, le poursuivre et conclure purement et simplement au paiement ; qu'il ne peut conclure qu'à la fixation, par le tribunal, d'un délai pour l'accomplissement du fait et au paiement après son expiration.—C. R.—*Bartley vs Breakey*, 11 Q. L. R., p. 1.

11. Que le locataire d'une maison ne peut réclamer en justice que les dommages par lui soufferts, et provenant du mauvais état des lieux loués, à partir de la mise en demeure du locateur de réparer les dits lieux.—MATHIEU, J.—*Charbonneau vs Duval*, 13 R. L., p. 309.

See also cases noted at C. C. 1079.

12. Que la demande de paiement faite par une lettre d'avocat, dans le cours ordinaire de l'exercice de la profession, est une mise en demeure suffisante et est d'accord avec les exigences de l'article 1152 du Code Civil.—GILL, J.—*Guimont vs Léonard*, 8 L. N., p. 171.

13. Que la demande de paiement faite par lettre du marchand, par envoi du compte ou par lettre d'avocat, est insuffisante.—JETTÉ, J.—*Smardon vs Lefèvre*, M. L. R., 1 S. C., p. 387.

1068. The debtor is also in default, when the thing which he has obliged himself to give or to do could only have been given or done within a certain time which he has allowed to expire.—Pothier, 143, 147 ; Authorities *suprà* ; C. N., 1146. [I. 67.]

DECISION :—A steamer having run ashore, the defendants agreed to launch it within fifteen days. On the sixteenth day the boat took fire, after which they did not exercise great diligence to launch her. The boat remained where she had grounded for several months, when she was carried off by the ice and sustained great damage, which the plaintiffs sought to recover from the defendants. The latter pleaded that they had not been put *en demeure*. It was held that, in this instance, time being of the essence of the contract putting *en demeure* was not necessary.—MONK, J.—*Beaudry vs Tate*, 3 L. C. L. J., p. 143.

1069. [In all contracts of a commercial nature in which the time of performance is fixed, the debtor is put in default by the mere

Digitized by Google

lapse of such time.]—*Cod.* L. 12, *De contrahendâ et committendâ stipulatione ;* 6 Toullier, n. 246. [I. 67.]

DECISIONS:—1. Qu'un contrat relativement à des actions dans une compagnie de chemin de fer, est d'une nature commerciale, et, qu'en conséquence, dans l'espèce, il n'était pas nécessaire de mise en demeure pour constituer l'appelant en défaut, vu que le contrat stipulait un délai déterminé pour son exécution.—Q. B.—*Senécal & Geoffrion*, 4 Q. B. R., p. 1.—TORRANCE, J.—6 L. N., p. 201.

2. Three months delay is not reasonable for goods to be delivered shortly.—TORRANCE, J.—*Thompson vs Murrie*, 4 L. N., p. 139.

3. Que le défaut de la demande par écrit, exigée par l'article 1067 C. C. pour la mise en demeure, lorsqu'un contrat est par écrit, n'affecte pas l'existence même du droit de la partie, mais ne se rapporte qu'au mode de prouver la mise en demeure, et qu'une mise en demeure verbale est suffisante, si elle est légalement prouvée, quoique le contrat soit par écrit.—C. R.—*Bélanger vs Paxton*, 14 R. L., p. 526.

4. The appellant sold to the respondent 500 tons of hay, and delivered a part thereof, when the respondent refused to accept any more, alleging that it was offered too late. Action for damages ensued, in which the appellant was successful.—Q. B.—1 L. N., p. 458.—SUPREME COURT.—*Chapman & Larin*, 4 S. C. R., p. 350, C. D., p. 68.

5. Que lorsque les biens d'un failli sont vendus sur une soumission et que l'acheteur refuse, sans raison, d'en payer le prix, et d'en recevoir la livraison, la vente est résolue de plein droit, après la mise en demeure de l'acheteur, et le vendeur peut, après les avis nécessaires, faire revendre les effets à la folle enchère de l'acheteur, et à ses risques et périls. Dans ce cas, la différence du produit de la vente compensera ce que ce dernier aura payé comptant. (C. C. 1544.)—TASCHEREAU, J.—*Desmarais vs Picken*, M. L. R., 1 S. C., p. 185.—Confirmed in Review—C. R.—M. L. R., 1 S. C., p. 476.

See also cases noted at C. C. 1070.

SECTION III.—OF THE DAMAGES RESULTING FROM THE INEXECUTION OF OBLIGATIONS.

1070. Damages are not due for the inexecution of an obligation until the debtor is in default under some one of the provisions contained in the articles of the preceding section ; except the obligation be not to do, when he who contravenes it is liable for damages by the fact of the contravention alone.—C. N., 1145, 1146. [I. 67.]

DECISIONS:—1. An action of *résiliation* for the non-performance of the conditions of a lease emphyteotic, cannot be maintained if the defendant has not been put *en demeure*.—K. B.—*Balston vs Pozer*, 1 R. de L., p. 348.

2. A promise to pay on demand £200 " with interest " is a promise to pay interest from the date of the note.—K. B.—*Baxter vs Robinson*, 2 R. de L., p. 439.

3. A person can recover by a direct action a sum of money paid by him, in advance, in consideration of a transfer which was to have been made in his favor by the defendant, the execution of which had became impossible, and need not

Digitized by Google

sue specifically for damages for a breach of the contract.—BÉLANGER, J.—*Bougie vs Leduc*, 5 R. L., p. 548.

4. Interest runs on the interest coupons of Railway debentures from the dates on which they respectively mature, without the necessity of putting the debtor *en demeure*.—C. R.—*DesRosiers vs Montreal, Portland & Boston Ry. Co.*, 6 L. N., p. 388, 28 L. C. J., p. 1.

5. Différence établie par les auteurs entre l'inexécution d'une obligation et l'inexécution incomplète ou imparfaite du contrat.—Q. B.—*Courville & Leduc*, 30 L. C. J., p. 316.

6. A sub-contractor who undertakes the construction of a section of a railroad, within a certain time, and only completes the same a year later than the date agreed on, cannot maintain an action against the contractor for alleged damages caused by the passage of the latter's trains, during the period between when the work should have been finished and its actual termination.—Q. B.—*McGreevy & McCarron*, 12 Q. L. R., p. 373, 14 R. L., p. 422.—SUPREME COURT.—13 S. C. R., p. 378.

See also cases noted at C. C. 1077.

1071. The debtor is liable to pay damages in all cases in which he fails to establish that the inexecution of the obligation proceeds from a cause which cannot be imputed to him, although there be no bad faith on his part.—*ff* L. 5, *De rebus creditis* ; Cod., *De actionibus empti et venditi*, L. 4 ; Pothier, 159, 164, 169 ; Domat, liv, 3, tit. 5, sec. 2, no 10 ; Domat, liv. 1, tit. 2, sec. 2, nn. 16, 17 ; 6 Toullier, 280, 281 ; C. N. 1147. [I. 67.]

DECISION :—Where appellant was obliged to return certain railway bonds to the respondent, but could not do so, owing to the fact of his having sold them, it was held that he should be condemned to pay the actual value thereof at the time the bonds were acquired by him and not their *par* or nominal value.—Q. B. —*Senécal & Hatton*, M. L. R., 1 Q. B., p. 112, 7 L. N., p. 415.—Confirmed in PRIVY COUNCIL.—10 L. N., p. 50. (Not reported in App. Cas.)

1072. The debtor is not liable to pay damages when the inexecution of the obligation is caused by a fortuitous event or by irresistible force, without any fault on his part, unless he has obliged himself thereunto by the special terms of the contract.—*ff* L. 23, *De reg. jur. in fine ;* Pothier, *Oblig.*, 142, 143, 149, 660, 668 ; Domat, liv. 1, tit. 1, sec. 3, n. 9 ; 6 Toullier, nn. 227, 228, 282 ; C. N., 1148. [I.67.]

DECISIONS:—1. Where a third person promises to one of the parties to a contract that he will assume it, that promise can only be binding upon him as to the person to whom the promise was made ; and a contract to deliver to certain persons during a fixed period all the malt that they may require for their brewery, can only be binding as long as malt may be required for the brewery ; and therefore the insolvency of such persons and their ceasing to employ the brewery terminates the contract, and no damages can be claimed upon the ground

Digitized by Google

of subsequent non-performance.—SEWELL, C. J.—*Oakley vs Morrogh*, Pyke's Reports, p. 74.

2. In the case of non-execution of a contract of sale of a specific and determined article destroyed by *vis major* without any fault of the vendor and which cannot be replaced, an action can be maintained for the restitution of moneys paid in advance of such contract, but cannot be maintained for damages by reason of the non-execution of the same. Judgment of the Superior Court accordingly confirmed as to the restitution and reversed as to the damages awarded.—Q. B.—*Russel & Levy*, 2 L. C. R., p. 457.

3. The defendant had set fire to some stumps of trees upon his property, with a view to clearing his land, when, suddenly, a heavy wind sprung up and carried the fire on to his neighbour's property. The defendant was hold responsible for the damages, although the fire had been communicated by *force majeure*.—C. R.—*Fordyce vs Kearns*, 2 R. L., p. 623.

4. Proof to the effect that goods in the custody of a common carrier were destroyed by a fire, which could not be accounted for otherwise than by the presumption that it was the result of spontaneous combustion, does not constitute inevitable accident or *force majeure*.—Q. B.—*Grand Trunk Ry. & Mountain*, 6 L. C. J., p. 173.—SMITH J.—3 L. C. J., p. 269.

5. Where the plaintiff by an agreement in writing transferred to the defendant a barge to use it and take possession of it at once but subject to the express condition that such use and possession would give defendant no right of property in the barge until he should have completed delivery of 500 tons of coal to plaintiff, according as the latter would require it, and the barge was lost by *force majeure* without fault of the defendant before the coal was all delivered, though after the time mentioned in the agreement within which it was deliverable, it was held that these circumstances did not take the case out of the ordinary rule *res perit domino ;* that the loss of the barge fell on the plaintiff as owner, and the defendant was not bound to complete delivery of the coal.—C. R.—*Beaudry vs Jakes*, 15 L. C. J., p. 118.

6. Le vol d'une montre mise en gage par le demandeur chez le défendeur, qui a été lui-même victime d'un vol plus considérable, sans qu'il y ait eu de sa part ni faute ni négligence, constitue un cas fortuit dont le défendeur ne peut être tenu responsable.—RAINVILLE, J.—*Soulier vs Lazarus*, 21 L. C. J., p. 104.

See also cases of accidents noted at C. C. 1053.

1073. The damages due to the creditor are in general the amount of the loss that he has sustained and of the profit of which he has been deprived; subject to the exceptions and modifications contained in the following articles of this section.—*ff* L. 13, *Ratam rem haberi*; Pothier, *Oblig.*, 159, 160, *Vente*, 74; Domat, liv. 1, tit. 1, sec. 2, nn. 17, 18; 6 Toullier, 263; C. N., 1149. [I. 67.]

DECISIONS:—1. Celui qui vend son fonds de commerce et d'affaires, et s'oblige de ne pas faire le même commerce au même endroit, peut être condamné à des dommages au cas d'infraction à cet engagement de sa part, et en ce cas les dommages peuvent être évalués par la Cour.—Q. B.—*Moss & Silverman*, 6 R. L., p. 675.

Digitized by Google

2. Que le coût d'un protêt notarié est recouvrable en justice, si la partie mise en demeure s'est soumise à ce protêt et a exécuté ce qu'on exigeait d'elle par ce protêt.—JETTÉ J.—*Poitevin vs Etienne*, 8 L. N., p. 157.

See also cases noted, under the title of Measure of Damages, at C. C. 1053.

See also cases noted, regarding costs of lawyer's letters, at C. C. 1733.

1074. The debtor is liable only for the damages which have been foreseen or might have been foreseen at the time of contracting the obligation, when his breach of it is not accompanied by fraud.—Cod., L. 1, *De sententiis quæ pro eo*; Pothier, *Oblig.*, 161, 162, 164, 165, *Vente*, 72, 73; Domat, *loc. cit.*; 6 Toullier, 284 et seq.; C. N., 1150. [I. 67.]

DECISION :—In any case the damages which a tenant can claim for the non-fulfilment of a condition of the lease must be the immediate and direct consequence of such inexecution, and will not include indirect losses, *e. g.*, damages alleged to have been suffered owing to the lessee's inability to fulfil contracts, or for waste of wood prepared for his business.—Q. B.—*Bell & Court*, M. L. R., 2 Q. B, p. 80.

See also cases noted, under the title of Measure of Damages, at C. C. 1053.

1075. In the case even in which the inexecution of the obligation results from the fraud of the debtor, the damages comprise only that which is an immediate and direct consequence of its inexecution. —*ff* L. 13, *De actione empti*; Cod., lib. 7, *Leg. inexecut*; Pothier, *Oblig.*, 166, 167; C. N., 1151. [I. 69.]

1076. [When it is stipulated that a certain sum shall be paid for damages for the inexecution of an obligation, such sum and no other, either greater or less, is allowed to the creditor for such damages.

But if the obligation have been performed in part, to the benefit of the creditor and the time for its complete performance be not material, the stipulated sum may be reduced; unless there be a special agreement to the contrary.]—Pothier, 345; C. L., 198; 6 Toullier, nn. 809, 810, 811, 812, 813; C. N., 1152, 1231. [I. 69. III. 381.]

DECISIONS :—1. A covenant in an obligation that, in default of payment of interest within thirty days from the period at which such interest becomes due, the whole of the debt with the interest shall immediately become exigible, is not comminatory and on such default judgment will be rendered for principal and interest.—BERTHELOT, J.—*McNevin vs Board of Arts*, 12 L. C. R., p. 335.

2. A clause in a deed of gift prohibiting the alienation of the property given under a heavy pecuniary penalty, is not comminatory, but is to be considered as a condition of the donation and as such exigible as soon as the prohibition was disobeyed.—BADGLEY, J.—*Cheval vs Morrin*, 6 L. C. J., p. 229.

See also cases noted at C. C. 1131.

Digitized by Google

1077. The damages resulting from delay in the payment of money, to which the debtor is liable, consist only of interest at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law.

These damages are due without the creditor being obliged to prove any loss. They are due from the day of the default only, except in the cases where by law they are due from the nature of the obligation.

This article does not affect the special rules applicable to bills of exchange and contracts of suretyship.—Pothier, 170, 171 ; Domat. liv. 3, tit. 5, sec. 1, nn. 2, 14 ; C. N., 1153. [1. 69.]

DECISIONS:—1. A promise to pay on demand £200 "with interest" is a promise to pay interest from the date of the note.—K. B.—*Baxter vs Robinson*, 2 R. de L., p. 439.

2. On an obligation for a sum of money with delay, without interest until the expiration of such delay, interest will be due after such delay shall have expired without the necessity of any *mise en demeure*.—Q. B.—*Rice & Ahern*, 12 L. C. R., p. 280, 6 L. C. J., p. 201.

3. Des deniers dotaux portent intérêt de plein droit.—SMITH, J.—*Poirier vs Lacroix*, 6 L. C. J., p. 302.

4. L'intérêt sur une somme dotale ne court que du jour de la demande judiciaire.—MONK, J.—*Gauthier vs Dagenais*, 7 L. C. J., p. 51.

5. In an action upon a foreign judgment "assessing the damages of the "plaintiff on occasion of the not performing of the promises within mentioned, "over and above his costs and charges by him about his suit in this behalf expend-"ed to £26.7.2 damages," proof *aliunde* of such promises is required and interest will be given from the date of such judgment.—MONK, J.—*Chapman vs Gordon*, 8 L. C. J., p. 196.

6. Where money is payable at the domicile of the debtor, demand of payment must be made there before interest can accrue thereon. The payment of the capital as due to a party indicated by the creditor, although after the date it fell due, is sufficient to prevent the accruing of interest thereon.—C. R.—*O'Halloran vs Kennedy*, 18 L. C. J., p. 284.

7. Interest on coupons due on bonds, can only be allowed from the date of the institution of the action to recover the same and does not commence to run as soon as they become due.—MACKAY, J.—*Macdougall vs Montreal Warehousing Co.*, 3 L. N., p. 64.

8. The failure to pay money at the proper time, can only give rise to the immediate and direct damages resulting therefrom, which are limited by law to the legal interest on the sum. But an obligation to give debentures bearing interest, is not to be treated as a mere obligation to pay money, and nominal damages may be allowed for default, without proof of actual damages.—Q. B.—*Corporation du comté d'Ottawa & Montreal, Ottawa & Occidental Ry.*, 28 L. C. J., p. 29, 6 L. N., p. 382.—TORRANCE, J.—5 L. N., p. 132.—Confirmed in the Supreme Court : —14 S. C. R., p. 193. C. D. page 129. See holding of that Court, noted act C. C. 1840.

9. Where a person sues another for money due, where the debt is really

Digitized by Google

compensated by another debt due by such person to the party sued, damages lie beyond the interest.—C. R.—*Aubin vs Quintal*, 29 L. C. J., p. 156.

10. Interest on deposits ceases from the date of the acceptance of the cheque by which such deposit is transferred to another party, though the cheque be not then presented for payment.—MACKAY, J.—*Wilson vs Banque Ville-Marie*, 3 L. N., p. 71.

11. Que le mandataire, qui reçoit de son mandant une somme d'argent à remettre à un tiers pour éteindre une obligation du mandant, vis-à-vis de ce tiers doit, si l'obligation porte intérêt à taux élevé, faire diligence pour exécuter son mandat, sans quoi il sera tenu au paiment de cet intérêt pour tout le temps qu'il aura négligé de faire remise des sommes d'argent dont il était porteur pour le tiers.—Q. B.—*Dulac & Bolduc*, 14 R. L., p. 359, 8 L. N., p. 370.

12. That in the case of an obligation for the payment of money, the damages resulting from the debtor's default are restricted to interest on the sum either at the rate stipulated or, in the absence of an agreement, at the rate fixed by law; and that the stipulation of a fixed sum in addition to the interest, for costs of collection, is illegal.—WURTELE, J.—*Leduc vs Gourdine*, 10 L. N., p. 161.

13. Que les héritiers ont droit aux intérêts que produisent les legs particuliers tant qu'ils n'ont pas été acquittés par l'exécuteur testamentaire.—PAPINEAU, J.—*Mayer vs Leveillé*, M. L. R., 3 S. C., p. 190.

See also cases noted at C. C. 1070.

1078. Interest accrued from capital sums also bears interest:

1. When there is a special agreement to that effect;

2. When in any action brought such new interest is specially demanded;

3. When a tutor has received or ought to have received interest upon the moneys of his pupil and has failed to invest it within the term prescribed by law.—*ff* L. 29, *De usuris et fructibus*; 6 Toullier, 271; 10 Duranton, 498-9; C. N., 1154. [I. 69.]

DECISIONS:—1 The fact of a plaintiff attempting to capitalize interest already accrued is not a sufficient ground for dismissing the action, although the Court may refuse to grant that portion of it which claims such compound interest. —Q. B.—*Dionne & Valleau*, 2 L. C. L. J., p. 112.

See case number 4 at C. C. 1070 and case number 7 at C. C. 1077.

CHAPTER SEVENTH.

OF DIFFERENT KINDS OF OBLIGATIONS.

SECTION I.—OF CONDITIONAL OBLIGATIONS.

1079. An obligation is conditional when it is made to depend upon an event future and uncertain, either by suspending it until the

Digitized by Google

event happens, or by dissolving it accordingly as the event does or does not happen.

When an obligation depends upon an event which has actually happened, but is unknown, to the parties, it is not conditional. It takes effect or is defeated from the time at which it is contracted.—*ff* L. 100, *De verb. oblig.*, 37, 38, 39, *Si certum petat.*; Pothier, 199, 202; C. N., 1168. [I. 71.]

DECISIONS:—1. Aucun versement ne peut être demandé sur des actions dans une compagnie incorporée, à moins que les conditions préalables à telle demande n'aient été remplies.—MONDELET, J.—*Massawippi Valley Ry. vs Walker* 3 R. L., p. 450.

2. A cheque was given to the Plaintiff on the Defendants on the understanding that the amount thereof was to be paid only when certain repairs to a house were completed. In an action taken it was not specifically alleged that these repairs had been completed, and as this was a condition precedent to the payment of the cheque, a demurrer to the action was sustained.—JOHNSON, J.—*Dufresne & Société de Construction Jacques-Cartier*, 5 R. L., p. 235.

3. A clause in a deed of sale of an immoveable, to the effect that such of the vendors as sign bind themselves to obtain the ratification of the deed by an absentee, is a condition precedent, and no action can be brought to recover any portion of the purchase money until such ratification has been effected.—C. R.—*Lenoir vs Desmarais*, 17 L. C. J., p. 308.

4. A stipulation in a deed of sale that the vendor should deliver to the purchaser the title deeds of the property sold, is not a condition precedent to the vendor's right to claim payment of the purchase money.—C. R.—*Filion & Lalonde*, 19 L. C. J., p. 14.

5. A condition of the purchase of a lot of land was that the vendor should furnish to the purchaser within one year the letters patent from the crown, which constituted the former's title. In an action for the payment of the price the said condition was held to be a condition precedent and the non-execution of the same was a temporary bar to the action.—PLAMONDON, J.—*Bouchard & Thivierge*, 4 Q. L. R., p. 152.

6. Where the Appellant made a promise of sale to the Respondent, of a farm, receiving so much in cash and the balance was to be paid yearly, and the Respondent was to be entitled to a bill of sale if the instalments were paid as they became due, and they were not so paid. *Held:* That the condition was resolutory and the contract was annulled.—SUPREME COURT.—*Grange & McLennan*, 9 S. C. R., p. 385, C. D., p. 462, 28 L. C. J., p. 69, 7 L. N., p. 407.—Q. B.—6 L. N., p. 138.

7. Que la convention par laquelle le propriétaire d'un cheval le loue pour le temps de 7½ mois, moyennant un loyer de $90, payable $3 par semaine, et au cas du paiement total du loyer, promet le vendre alors et donner quittance du prix que le loyer représente, est légale, et que la propriété du cheval ne change pas tant que le loyer n'est pas intégralement payé, et que le propriétaire peut revendiquer ce cheval, même entre les mains d'un tiers.—MATHIEU, J.—*Bertrand vs Gaudreau*, 12 R. L., p. 154.

See also cases noted at C. C. 1067, 1472 and 1478.

Digitized by Google

1080. Every condition contrary to law or inconsistent with goods morals is void, and renders void the obligation which depends upon it.

An obligation which is made to depend upon the doing or happening of a thing impossible is also void.—*ff* L. 7, 137, § 6, *De verb. signif ; ff* L. 1, §§ 9, 11 ; L. 31, *De oblig. et action ;* Pothier, 204 ; C. N., 1172. [I. 71.]

DECISION :— Que la condition insérée dans un acte de donation fait en 1864, comportant substitution, que cette substitution ne pourra être recueillie par celui ou ceux qui professeront une religion déterminée (la religion protestante) est nulle et doit être considérée comme non écrite, mais n'annule pas la disposition. —MATHIEU, J.—*Kimpton vs Canadian Pacific Ry.*, 16 R. L., p. 361.

See also cases noted at C. C. 990.

1081. An obligation conditional on the will purely of the party promising, is void ; but if the condition consist in the doing or not doing of a certain act, although such act be dependent on his will, the obligation is valid.—*ff* L. 8, *De oblig. et action ; ff* L. 108, § 1, *De verb. oblig ; "Nulla promissio potest consistere quæ ex voluntate promittentis statum capit ;"* Pothier, 47, 48, 205 ; C. N., 1174. [I. 71.]

1082. If there be no time fixed for the fulfilment of a condition, it may always be fulfilled ; and it is not deemed to have failed until it has become certain that it will not be fulfilled.—Pothier, 209, 210, 211 ; 6 Toullier, 623, 624 et seq ; C. N., 1178. [I. 71.]

1083. When an obligation is contracted under the condition that an event will not happen within a fixed time, such condition is fulfilled by the expiration of the time without the event having occurred. It is equally so if before the time has expired it become certain that the event will not happen. If there be no time fixed, the condition is not demed fulfilled until it is certain that the event with not happen.—Authorities under preceding article ; C. N., 1177. [I. 71.]

1084. A conditional obligation becomes absolute when the party bound under the condition prevents the fulfilment of it.—*ff* L. 81, § 1, *De condition. et demonstrat. ; ff* L. 85, § 7, *De verb. oblig. ; ff* L. 24, 39, *De reg. jur ;* Pothier, 212 ; Domat, liv. 1, tit. 1, sec. 4, n. 17 ; C. N., 1178. [I. 71.]

1085. The fulfilment of the condition has a retroactive effect from the day on which the obligation has been contracted. If the

Digitized by Google

creditor be dead before the fulfilment of the condition, his rights pass to his heirs or legal representatives.—*ff* L. 18, 144, *De reg. jur ; Argumentum ex Lege* 26, *De conditionibus institutionum ;* Pothier, 220 ; Domat, liv. 1, tit. 1 sec. 4, nn. 7, 13 ; C. N., 1179. [I. 71.]

DECISIONS:—1. Certains effets et marchandises dont le prix est réclamé en cette cause par les appelants, marchands à Montréal, furent vendus à l'intimé, sur échantillons, à l'Ile Verte, dans le District de Kamouraska, par le commis-voyageur des appelants ; il fut prouvé que cette vente était faite sous condition, c'est-à-dire sujette à l'approbation des appelants, mais qu'elle fut effectivement approuvée et ratifiée par eux, et les effets et marchandises expédiés à l'intimé à l'Ile Verte.—JUGÉ.—Que dans l'espèce, le droit d'action des appelants a pris naissance à l'Ile Verte, dans le District de Kamouraska, et non pas à Montréal.—Q. B.—*Gault & Bertrand,* 25 L. C. J., p. 340.

2. Que si un contrat de mariage stipule, qu'advenant le décès du mari, il serait loisible à la femme et à ses enfants de demeurer dans le logement et les dépendances du mari gratuitement pendant sa viduité, sans qu'on puisse les déranger en aucune façon, et que, pendant le mariage, le mari vend la seule maison dont il était le propriétaire et où il logeait à son mariage, et décède ensuite sans laisser aucune maison ni aucun logement, la femme a droit d'obtenir des héritiers du mari un logement ou une somme d'argent par chacun, en représentant la valeur annuelle d'un logement de mêmes conditions que celui en vue dans le contrat de mariage.—CIMON, J.—*Hébert vs Rossignol,* 10 L. N., p. 5.

1086. The creditor may, before the fulfilment of the condition, do all acts conservatory of his rights.—Pothier, 222 ; C. N., 1180. [I. 71.]

DECISIONS:—1. Un créancier éventuel ou conditionnel a droit de faire tous les actes conservatoires nécessaires pour s'assurer le paiement de sa dette.—Pour cela il peut refuser de payer et garder entre ses mains toute somme d'argent qu'il doit à celui dont il est le créancier éventuel, si celui-ci est insolvable.—C. R.—*Roussel vs Primeau,* I R. L., p. 703.

2. Que la donation par contrat de mariage du futur époux à la future épouse, du tiers des biens meubles et immeubles qui appartiendraient à l'époux lors de son décès, si la future épouse lui survit, ne peut faire l'objet d'une réclamation lors de la faillite du mari.—Q. B.—*Workman & Mullholland,* 10 R. L., p. 412.

1087. When the obligation has been contracted under a suspensive condition, the debtor is bound to deliver the thing which is the object of it, upon the fulfilment of the condition.

If, without the fault of the debtor, the thing have altogether perished or can no longer be delivered, no obligation exists.

If the thing be deteriorated without the fault of the debtor, the creditor must receive it, in the state in which it is, without diminution of price.

If the thing be deteriorated by the fault of the debtor, the creditor may either exact the thing in the state in which it is, or demand

Digitized by Google

the dissolution of the contract, with damages in either case.—*ff* L. 8, 10, *De periculo et commodo rei venditæ*; Cod., lib. 4, tit. 4, L. 5; Pothier, 218, 219; Domat, liv. 1, tit. 1, sec. 4, n. 10; C. N., 1182. [I. 73.]

1088. A resolutive condition, when accomplished, effects of right the dissolution of the contract. It obliges each party to restore what he has received, and replaces things in the same state as if the contract had not existed; subject nevertheless to the rules established in the last preceding article with respect to things which have perished or been deteriorated.—Cod., lib. 8, tit. 38, L. 12; *Argumentum ex leg.* 1, 4, *ff De lege commis*; Pothier, 224, 672; 6 Toullier, 550, 551; C. N., 1183. [I. 73.]

DECISIONS—1. A legacy by a father to a daughter, conditional upon her not doing certain things, is forfeited by her doing such things.—C. R.—***Freligh vs Seymour***, 2 L. C. J., p. 91.

2. Celui qui vend un chaland sans passer de titre, et qui reçoit un accompte sur le prix, n'a pas le droit de reprendre le dit chaland sans forme de procès, et s'il le reprend, il sera condamné à en payer la valeur, déduction faite de ce qui lui est encore dû sur le prix.—Q. B.—***Beaupré & Labelle***, 7 R. L., p. 589.

See also cases noted at C. C. 1079.

SECTION II.—OF OBLIGATIONS WITH A TERM.

1089. A term differs from a suspensive condition inasmuch as it does not suspend the obligation, but only delays the execution of it.—*ff* L. 41, L. 46, *De verb. oblig*; Pothier, 230; C. N., 1185. [I. 73.]

DECISION:—Que les délais fixés par un jugement de la Cour Supérieure pour l'exécution d'une obligation mentionnée dans ce jugement sont suspendus par l'inscription de la cause en révision et ne doivent compter qu'à dater de l'enrégistrement du jugement de la Cour de Révision au bureau du Protonotaire de la Cour Supérieure quand même ce jugement de la Cour de Révision ne ferait pas mention de ces délais.—C. R.—***Dyson vs Sweanor***, 15 R. L., p. 423.

1090. That which is due with a term of payment cannot be exacted before the expiration of the term; but that which has been paid in advance voluntarily and without error or fraud cannot be recovered.—*ff* L. 1, § 1, *De condit. et demonst.*; *ff* L. 46, *loc. cit., in art. suprà*; Pothier, 230, 231, 547; Domat, liv. 1, tit. 1, sec. 3, n. 7; liv. 4, tit. 1, sec. 1, n. 5; 4 Marcadé, nn. 572-3-4; Vol. 5, p. 256; 11 Duranton, 113; 3 Zach., 385, n. 6; 11 Toullier, 59, 60; C. N. 1186. [I. 73.]

1091. The term is always presumed to be stipulated in favor of the debtor, unless it results from the stipulation or the circumstances

Digitized by Google

that it has also been agreed upon in favor of the creditor.—*ff* L. 41, *in fine; ff loc. cit., in art. suprà*; Pothier, 833; C. N., 1187. [I. 73.]

DECISIONS:—1. Respondent left with Appellants in their office, a cheque for $400, on an agreement that if he failed to appear next morning, at eleven o'clock, to put in bail in a capias case taken against him, the Appellants were to take the cheque for the debt and costs.—*Held*:—That the Respondent did not present himself with his bondsmen at the office within the limits of time fixed, and that Appellant had the right to keep the cheque.—Q. B.—*McMaster & Moffatt*, 4 Q. B. R., p. 238.

2. Que dans un prêt à intérêt, le bénéfice du terme est censé stipulé en faveur des deux parties contractantes, et qu'en conséquence, l'emprunteur ne peut obliger le créancier à recevoir le paiement de sa créance avant échéance.—C. R.—*Ouimet vs Ménard*, 30 L. C. J., p. 308, M. L. R., 3 S. C., p. 42.

3. O. having effected a loan payable in ten years with interest at six per cent by monthly instalments, fixed by dividing the principal and interest added together, the delay of payment was in favor of the debtor, who could pay by anticipation before its expiry, allowing for interest only up to the time of payment.—Q. B.—*Société de Construction des Artisans & Ouimet*, 14 Q. L. R., p 81.

1092. The debtor cannot claim the benefit of the term when he has become a bankrupt or insolvent, or has by his own act diminished the security given to his creditor by the contract.—Pothier, 234, 235; C. N., 1188. [I. 73.]

DECISIONS:—1. A promissory note *à terme* in case of insolvency, is immediately exigible.—C. R.—*Lovell vs Meikle*, 2 L. C. J., p. 69.

2. That a company ceasing to meet its ordinary payments as they becomes d e, though its nominal assets may be equal to its liabilities, will be deemed insolvent, and cannot claim the benefit of the term upon a promissory note not yet due.—TASCHEREAU, J.—*Corcoran vs Montreal Abattoir Co.*, 6 L. N., p. 135.

3. The mere fact of insolvency, causes the debtor to lose the benefit of the stipulated term, independently of the question of diminished security. Hence, rent, not yet exigible by terms of the lease, becomes so by the insolvency of the tenant though the *gage* be not diminished.—JOHNSTON, J.—*Ménard vs Peltier*, 7 L. N., p. 15.

4. When, in a deed of sale of an immoveable, the price has been made payable by instalments, with a *bailleur de fonds* hypothec, enregistered before the promulgation of the *cadastre*, there being no obligation imposed by the deed of sale on the purchaser to renew the hypothec after the *cadastre* should be promulgated:—*Held*:—That the act of the purchaser in creating a hypothec on the immoveable which hypothec had been registered before the promulgation of the *cadastre* and renewed after it, and the purchaser's omission to renew the *bailleur de fonds* hypothec, had not diminished the security of the seller and had not rendered the instalment of purchase money exigible, under C. C. 1092.—CASAULT, J.—*Gilbert vs Minguy*, 10 L. N., p. 58.

5. Que l'insolvabilité du débiteur lui fait perdre le bénéfice du terme convenu.—MATHIEU, J.—*Furniss vs Bleault*, M. L. R., 2 S. C., p. 419.

Digitized by Google

SECTION III.—OF ALTERNATIVE OBLIGATIONS.

1093. The debtor in an alternative obligation is discharged by giving or doing one of the two things which form the object of his obligation; but he cannot compel the creditor to accept a part of one of these things and a part of the other.—*ff* L. 78, § ult., *De condit. et demonst.*; *ff* L. 8, § 1, *De legatis*, 1; Pothier, 245, 246, 247; C. N., 1189, 1191. [I. 73 to 75.]

DECISIONS:—Where no delay is fixed by the contract for the performance of an alternative obligation, the debtor can only be deprived of his option by the expiration of a delay fixed by a judgment against him; and therefore, when the amount of a municipal corporation's subscription to a Railway Company was payable, either in debentures or money, the corporation could not, by a mere notarial protest served on it, fixing a time for the delivery of the debentures, be deprived of its option to pay in debentures, and the action against the Corporation should have given the alternative.—Q. B.—*Compagnie du Chemin de Fer des Laurentides & Corp. de la Paroisse de St. Lin*, 3 L. N., p. 34, 24 L. C. J., p. 191.

2. That a composition and discharge, being an act of liberality towards a debtor, must be strictly complied with by him. So, when a debtor failed to punctually meet the instalments of his composition as they fell due, and the creditor thereon sued for the full amount of his original debt, the action was maintained. —TORRANCE, J.—*Ross vs Bertrand*, 9 L. N., p. 314.

3. Similar decision,—TORRANCE, J.—*Rolland vs Seymour*, 2 L. N., p. 324.

1094. The option belongs to the debtor unless it has been expressly granted to the creditor.—*ff* L. 2, § 3, *De eo quod certo loco*; *ff* L. 25, *De contrahendâ emptione*; Pothier, 247, 248, 283; Domat, liv. 1, tit. 1, sec. 2, n. 15; C. N., 1190. [I. 75.]

1095. An obligation is pure and simple although contracted in an alternative form, if one of the two things promised could not be the object of the obligation.—*ff* L. 72, § 4, *De solutionibus*; Pothier, 249; C. N., 1192. [I. 75.]

1096. An alternative obligation becomes pure and simple if one of the things promised perish, or can no longer be delivered, even through the fault of the debtor. The value of such thing cannot be offered in its place;

If both things have perished or can no longer be delivered, and the debtor be in fault with respect to one of them, he must pay the value of that which remained last.—*ff* L. 34, § 6, *De contrahendâ emptione*; *ff* L. 115, *De verb. oblig*; *ff* L. 2, § 3, *De eo quod certo loco*; *ff* 3, L. 95, *De solutionibus*; Pothier, *Oblig.*, 250, 251, 252, *Vente*, 312;

Digitized by Google

Contrà, L. 47, §3, *De legat.*, 1o & Rousseau de Lacombe, vo *Alternative*, no 2 ; C. N., 1193. [I. 75.]

DECISION :—La caution judiciaire fournie conformément à l'article 869 C. P. C., et qui s'était, aux termes du cautionnement, obligée de remettre les effets saisis-revendiqués ou d'en payer la valeur qui serait constatée par jugement rendu dans la cause, demeure tenue, aux termes de l'article 1096 C. C., de l'obligation pure et simple de rendre les effets saisis-revendiqués, lorsque le jugement est devenu impossible, faute du rapport du bref. En ce cas, le délai d'un an depuis le congé-défaut à la date de l'institution de l'action contre la caution, sans avis à cette dernière, ne la libère pas.—Q. B.—*Poulin & Hudon*, 6 R. L. p. 314.

1097. When, in the cases provided for in the last preceding article, the option has been granted by the contract to the creditor ;

Either one of the two things has perished or can no longer be delivered, and then, if it be without the fault of the debtor, the creditor shall have the one which remains, but if the debtor be in fault, the creditor may demand the thing which remains or the value of the other ;

Or both things have perished or can no longer be delivered, and if the debtor be in fault with regard to both or either of them, the creditor may demand the value of the one or of the other at his option. —*ff* L. 95, *De solutionibus* ; Pothier, 253 ; C. N., 1194. [1. 75.]

1098. If both things have perished, the obligation is extinguished in the cases and subject to the conditions provided in article 1200.—C. N., 1195. [I. 75.]

1099. The rules contained in the articles of this section apply to cases where the alternative obligation comprises more than two things, or has for its object todo or not to do some thing.—C. N., 1196. [I. 75.]

SECTION IV.—OF JOINT AND SEVERAL OBLIGATIONS.

§ 1. *Of joint and several interest among creditors.*

1100. A joint and several interest among creditors gives to each of them singly the right of exacting the performance of the whole obligation and thereupon of discharging the debtor.—Cod., *De duobus reis stipul. et promit.* ; *ff* L. 2, *De duobus reis constituendis ;* Pothier, 258, 259, 260 ; Domat, liv. 3, tit. 3, sec. 2, nn 1, 2, 6 ; Introduction to this title , p. 247, folio edit ; C. N., 1197. [I. 77.]

Digitized by Google

1101. The debtor has the option of paying to either of the joint and several creditors, so long as he is not prevented by a suit instituted by one of them.

[Nevertheless, if one of the creditors release the debt, the debtor is discharged for the part only of such creditor. The same rule applies to all cases in which the debt is extinguished otherwise than by actual payment; subject to the rules applicable to commercial partnerships.]—*ff* L. 2, 16, *De duobus reis*; Pothier, 260; Domat, *loc. cit.* and n. 3; C. N., 1198. [I. 77.]

1102. The rules concerning the interruption of prescription in relation to joint and several creditors are declared in the title *Of Prescription.*—Cod., L. 5, *De duobus reis stipulandi*; Pothier, 260; Domat, *loc. cit.*, n. 5; C. N., 1199. [I. 77.]

§ 2. *Of debtors jointly and severally obliged.*

1103. There is a joint and several obligation on the part of the codebtors when they are all obliged to the same thing, in such manner that each of them singly may be compelled to the performance of the whole obligation, and that the performance by one discharges the others toward the creditor.—*ff* L. 2, L. 3, § 1, L. 11, § 1, *De duobus reis constituendis*; Cod., L. 3, *De duobus reis stipulandi*; Pothier, 261, 263, 274; Domat, liv. 3, tit. 3, sec. 1, no 1; C. L. 2086; C. N., 1200. [I. 77.]

1104. An obligation may be joint and several although one of the codebtors be obliged differently from the others to the performance of the same thing; for example, if one be obliged conditionally while the obligation of the other is pure and simple, or if one be allowed a term which is not granted to the other.—*ff* L. 7, L. 9, § 2, *De duobus reis constituendis*; Pothier, 263; Domat, liv. 3, tit. 3, sec. 1, n. 5; C. L., 2087; C. N. 1201. [I. 77.]

DECISIONS:—1. When two persons who had sold one fourth interest in an invention were condemned to make a practical test of the value of the invention, as stipulated in the contract, or to repay the purchase money, the condemnation was properly held to be joint and several.—C. R.—*Dyson vs Sweanor*, M. L. R., 3 S. C., p. 361.

2. Que deux signataires d'un billet promissoire sont obligés conjointement et solidairement, quoique la solidarité ne soit pas exprimée.—MATHIEU, J.—*Perreault vs Bergevin*, 14 R. L., p. 604.

3. Que l'obligation des propriétaires de biens immeubles de payer les taxes dues à la Cité de Montréal est indivisible, conjointe et solidaire, et que cette der-

Digitized by Google

nière peut en poursuivre le paiement, en entier, contre celui dont le nom est inscrit au rôle d'évaluation ou de tout autre propriétaire par indivis.—TELLIER, J. —*Cité de Montréal vs Cassidy*, M. L. R., 4 S. C., p. 32.

1105. An obligation is not presumed to be joint and several; it must be expressly declared to be so.

This rule does not prevail in cases where a joint and several obligation arises of right by virtue of some provision of law;

Nor is it applicable to commercial transactions, in which the obligation is presumed to be joint and several, except in cases otherwise regulated by special laws.—*ff* L. 6, L. 8, L. 11, § 2, *De duobus reis constit.*; Novel. 99, c. 1, *ff* L. 43, *De re judic. et effectu sententiæ*, Cod., L. 3, *De duobus reis*; Pothier, 265, 266; Boutaric, *Instit.*, p. 444; 2 Bornier, pp. 491, 492, tit. 4, art. 7, Ord. 1673; Domat, liv. 3, tit. 3, sec. 1, n. 2; C. N., 1202. [I. 79.]

Amendment.—Parties to deeds, executed before a notary, are jointly and severally liable for his disbursements and fees.

This provision, in cases of deeds of composition and discharge, applies only to the parties who have given instructions to have them prepared.—Q. 32 Vict., cap. 32, s. 15.

DECISIONS:—1. If the party contesting an election and the sitting member join in applying for the appointment of a commissioner, they are liable jointly and severally for the fees of such commissioner.—C. R.—*McCord vs Bellingham*, 2 L. C. J., p. 42.

2. L'expert nommé par une partie, ou nommé par la cour, sur le choix de la partie, n'a de recours, pour le paiement de ses frais, honoraires ou émoluments, que contre telle partie, l'autre partie, ou les autres parties en litige n'étant pas tenues et obligées solidairement envers tel expert.—Q. B.—*Brown & Wallace*, 5 L. C. J., p. 60.

3. Les enfants qui sont tenus par la loi de fournir des aliments à leurs parents doivent y être condamnés solidairement.—Les parents peuvent s'adresser à celui des enfants qu'ils jugent à propos pour lui demander des aliments.—MONK, J.—*Lauzon vs Connoissant*, 5 L. C. J., p. 99.

4. Des débiteurs solidaires, assignés par une même action, peuvent permettre à l'un d'eux, qui est insolvable, de faire à leur créancier commun de faux frais, dans cette même action, sans en être responsables eux-mêmes.—Les endosseurs d'un billet promissoire, poursuivis avec le tireur par une action et comparaissant tous, tireur et endosseurs, par le même avocat et plaidant tous aussi (mais séparément) par le même avocat, ne sont pas considérés comme ayant une connaissance légale des moyens de défense employés par le tireur, leur co-défendeur, et ne sont pas censés connaître légalement les incidents, procédés et jugements, ni appels intervenus sur les moyens de défense du tireur, et il faut, pour rendre les endosseurs responsables des faux frais occasionnés par le tireur, leur dénoncer les incidents intervenus sur la défense du tireur, et spécialement les appels auxquels cette défense donne lieu.—La signification de l'appel interjeté,

Digitized by Google

par le porteur du billet, du jugement rendu sur la défense du tireur, quoique faite au procureur commun du tireur et des endosseurs, n'est pas une dénonciation suffisante de l'appel aux endosseurs, pour les rendre responsables des frais encourus sur cet appel.—Q. B.—*Boucher & Latour*, 6 L. C. J., p. 269.

5. Action against a married man and his mother for price of furniture alleged to have been sold to them jointly and severally. Defendants endeavoured to prove that the sale was made to the mother alone and that the son was of impaired intellect. Judgment against defendants jointly but without *solidarité*.—C. R.—*Laberge vs DeLorimier*, M. C. R., p. 105.

6. Upon a personal action for arrears of rent of a *rente constituée* against his heirs possessing *par indivis*, the condemnation cannot be against them *solidairement*.—In the case submitted, a personal action will lie upon the undertaking of the donees to pay a *rente constituée* in favor of the *auteur* from whom the donor had acquired the immoveable.—Q. B.—*Pappans & Turcotte*, 15 L. C. R., p. 153.

7. The petitioners in the case of a contested election are jointly, *not* severally, liable to the sitting member for their half of the commissioner's fees paid by the sitting member.—Q. B.—*Lamère & Guévremont*, 1 L. C. L. J., p. 59.

8. Un mari et une femme séparés de biens sont conjointement et solidairement tenus au paiement de choses nécessaires à la vie, bien qu'elles aient été achetées pendant la communauté.—SMITH, J.—*Paquette vs Limoges*, 7 L. C. J., p. 30.

9. Where necessaries are supplied by a trader to a husband and wife separated as to property, and delivered at their domicile for the use of their household, the husband and wife are jointly and severally liable for such necessaries.—MONK, J.—*St. Amand vs Bourret*, 7 L. C. J., p. 32.

10. Both husband and wife *séparés de biens* are jointly and severally liable for a joint note made in the course of a business in which they were both jointly interested.—MONK, J.—*Girouard vs Lachapelle*, 7 L. C. J., p. 289.

11. Plusieurs débiteurs non solidaires peuvent être poursuivis par la même demande, et condamnés à payer diverses sommes de deniers individuellement, mais solidairement aux frais de l'action.—SMITH, J.—*Perkins vs Leclaire*, 7 L. C. J., p. 78.

12. Sur action personnelle pour arrérages de rente constituée contre des héritiers possédant par indivis, la condamnation ne peut être solidaire; et dans l'espèce, il y a lieu à l'action personnelle, sur obligation par des donataires de payer une rente constituée en faveur de l'auteur duquel le donateur avait acquis l'immeuble.—Q. B.—*Pappans & Turcotte*, 15 L. C. R., p. 153.

13. Il n'existe aucune solidarité entre plusieurs parties signataires de la pièce de procédure, par laquelle commencent les vacations de l'avocat, pour le paiement des honoraires de cet avocat.—L'avocat est lié par les conventions particulières intervenues entre tels signataires, relativement aux frais à faire, quoique cet avocat soit étranger à ces conventions et même les ignore, et si, par telles conventions, l'un des signataires est exonéré des frais par ses co-signataires, l'avocat n'a aucune action contre celui-là.—MONK, J.—*Doutre vs Dempsey*, 9 L. C. J., p. 176.

14. In January 1848, Croteau executed a deed of obligation for £50 and interest, in favor of Arcand's *auteur* and mortgaged thereby a certain piece of land, which in June, 1855, he sold to Blanchet, who by the deed of sale, bound and obliged himself to pay the said debt, and who the same day executed an-

Digitized by Google

other deed of obligation, without novation for £75 and interest, being the principal and interest accrued on the original debt in favor of the Plaintiff's *auteur*. Action against Blanchet and Croteau, for joint and several condemnation for amount due under the said deeds. Action dismissed on demurrer. No action for a joint and several condemnation lies.—TASCHEREAU, J.—*Arcand vs Blanchet*, 2 R. L., p. 626.

15. Deux cultivateurs qui ont signé un billet promissoire ne sont pas obligés solidairement, et la solidarité n'existe que dans le cas où les faiseurs d'un billet sont commerçants.—MACKAY, J.—*Malhiot vs Tessier*, 1 R. C., p. 121.

16. Several seigniors agreed to take measures to protect their interests before the Court and in Parliament. A committee named by them caused several factums, documents, etc., to be printed.—*Held*: That the members of the committee were jointly responsible to the printer for the price of the documents printed.—*Semble*: The committee might even have been condemned, jointly and severally.—Q. B.—*Papineau & Lovell*, 14 L. C. J., p. 238.

17. Similar decision.—C. R.—*Lovell vs Campbell*, 11 L. C. J., p. 317.

18. Professional attornies who carry on business under a firm name, are liable as partners for monies collected by the firm.—Q. B.—*Ouimet vs Bergevin*, 22 L. C. J., p. 265.

19. The obligation of children to support an indigent parent, is not joint and several, but each child is condemned to contribute in proportion to his means.—JOHNSON, J.—*Leblanc vs Leblanc*, 1 L. N., p.618.

20. The obligation of children to furnish aliments to their father is not joint and several, but is divisible; nor are they jointly and severally liable for the costs of suit brought to recover from them an alimentary allowance.—CARON, J.—*Crévier vs Crevier*, 9 R. L., p. 313.

21. Que lorsqu'une donation entrevifs est faite à certaine condition, qui, par son avènement, annule l'acte, les donataires sont tenus conjointement et solidairement de rendre compte au donateur de leur jouissance de la propriété depuis l'avènement de la condition.—TASCHEREAU, J.—*Thivierge vs Thivierge*, M. L. R., 2 S. C., p. 198.

See also case noted at C. C. 1121.

1106. The obligation arising from the common offence or quasi-offence of two or more persons is joint and several.—Pothier, *Oblig.*, 264. [I. 79.]

DECISIONS:—1. La réparation faite par l'un des auteurs du libelle, ne libère pas son complice, quoiqu'elle puisse atténuer les dommages.—La solidarité, dans ce genre de délit, résulte de la suggestion des écrits diffamatoires, sans participation dans le fait matériel de leur rédaction.—MONK, J.—*McMillan vs Boucher*, 12 L. C. J., p. 319.

2. Qu'il y a solidarité entre deux ou plusieurs personnes pour les dommages résultant d'un délit commis conjointement, et que le règlement fait par l'un libère les autres.—STUART, J.—*Giroux vs Blais*, 7 Q. L. R. p. 309.

3. All who participate in a *délit* or *quasi délit* are jointly and severally liable for the loss or injury resulting therefrom, and therefore, persons who have wrongfully cut and carried away wood which did not belong to them, are jointly and severally liable to the owner for the value thereof.—Q. B.—*Lalonde & Bélanger*, 24 L. C. J., p. 96.

Digitized by Google

1107. The creditor of a joint and several obligation may apply for payment to any one of the codebtors at his option, without such debtor having a right to plead the benefit of division.—*ff* L. 3, *De duobus reis*; *ff* L. 47, *Locati conducti;* Secùs, *Novel.* 99, c. 1; Pothier, 270; 4 Bretonnier sur Henrys, p. 419; *Contrà*, Domat, liv. 3, tit. 3, sec. 1, n. 3; C. L., 2089; C. N., 1203. [I. 79.]

1108. Legal proceedings taken against one of the codebtors do not prevent the creditor from taking similar proceedings against the others.—Cod., L. 28, *De fidejuss et mandat.*, 8, 41; Pothier, 271; Domat, *loc. cit., suprà*, n. 7; C. L., 2090; C. N., 1204. [I. 79.]

1109. If the thing due have perished or can no longer be delivered, through the fault of one or more of the joint and several debtors, or after he or they have been put in default, the other codebtors are not discharged from the obligation to pay the price of the thing, but the latter are not liable for damages.

The creditor can recover damages only from the codebtors through whose fault the thing has perished or can no longer be delivered, and those in default.—*ff* L. 18, *De duobus reis constituendis;* L. 32, § 4, *De usuris et fructibus*; L. 173, § 2, *De div. reg. juris;* Dumoulin, *Trac. de dividuo et individuo*, part. 3, nn. 126-7; Pothier, 273; C. L., 2091; C. N., 1205. [I. 79.]

1110. The rules concerning the interruption of prescription in relation to joint and several debtors are declared in the title *Of Prescription.*—Cod., L. 5, *De duobus reis, etc*; Pothier, 272; Dumoulin, *loc cit., suprà*, n. 9; C. L., 2092; C. N., 1206. [I. 79.]

1111. A demand of interest made against one of the joint and several debtors causes interest to run against them all.—Cod., *Arg. ex. leg.* 5, *De duobus reis*; Pothier, 272; 6 Toullier, n. 729; 4 Marcadé, n. 611; C. L., 2093; C. N., 1207. [I. 81.]

1112. A joint and several debtor sued by the creditor may plead all the exceptions which are personal to himself as well as such as are common to all the codebtors. He cannot plead such exceptions as are purely personal to one or more of the other codebtors.—*ff* L. 10, 19, *De duobus reis*; Pothier, 274; Domat, *loc. cit., suprà*, n. 8; C. L. 2094; C. N., 1208. [I. 81.]

Digitized by Google

DECISION:—La caution qui ne requiert point sur les premières poursuites dirigées contre elle le bénéfice de discussion doit être condamnée au paiement de la créance dans la même poursuite avec le débiteur principal.—C. R.—*Sargent vs Johnston*, 13 L. C. J., p. 298.

1113. When one of the codebtors becomes heir or legal representative of the creditor, or when the creditor becomes heir or legal representative of one of the codebtors, the confusion extinguishes the joint and several debt only for the part and portion of such codebtor. —*ff* L. 95, § 2, *De solut. et liberat.*; *ff* L. 50, *ibid*; Pothier, 276; Domat, *loc. cit., suprà*; C. L., 2095; C. N., 1209. [I. 81.]

1114. The creditor who consents to the division of the debt with regard to one of the codebtors, preserves his joint and several right against the others for the whole debt.—Pothier, *Oblig.*, 277; *Rente*, 194, 195; C. L., 2096; C. N., 1210. [I. 81.]

1115. A creditor who receives separately the share of one of his codebtors, so specified in the receipt and without reserve of his rights, renounces the joint and several obligation with regard only to such codebtor.

The creditor is not deemed to discharge the debtor from his joint and several obligation when he receives from him a sum equal to the share for which he is bound, unless the receipt specifies that it is for his share.

The rule is the same with regard to a demand made against one of the codebtors for his share, if the latter have not acquiesced in the demand, or if a judgment of condemnation have not intervened.—Cod., L. 18, *De pactis*; Pothier, 277, 278, 575 or 611; Bacquet, *Droits de justice*, ch. 21, n. 245; C. L., 2097; C. N., 1211. [I. 81.]

DECISION:—The holder of a promissory note to order under protest who has received an account from the maker and another note at three months, retaining the first note as security for the second, does not lose his recourse against the endorsers of the first note who have given their assent to the transaction the insolvency of the maker of the first note.—Q. B.—*Woodbury & Garth*, 9 L. C. R., p. 438.

1116. The creditor who receives separately and without reserve the share of one of the codebtors in the arrears or interest of the debt, loses his joint and several right only for the arrears and interests accrued and not for those which may in future accrue, nor for the capital, unless the separate payment has been continued during [ten]

Digitized by Google

consecutive years.—Bacquet, *Droits de justice*, n. 246; Pothier, 279; C. L., 2098; C. N., 1212. [I. 81.]

1117. The obligation contracted jointly and severally toward the creditor is divided of right among the codebtors, who among themselves are obliged each for his own share and portion only.—Cod., L. 2, *De duobus reis stipulandi et promitt.*; Pothier, 264; Domat, liv. 3, tit. 3, sec. 1, n. 6; C. L., 2099; C. N., 1213. [I. 83.]

DECISION: Que dans la présente cause les appelants étaient non seulement les syndics mais aussi intéressés comme créanciers à la liquidation des affaires de N. Tétu & Cie. Que la responsabilité des créanciers intéressés à la dite liquidation ne se règle pas d'après C. C. 1726 mais d'après C. C. 1117 et 1118, qui décrètent que l'obligation conjointe et solidaire de plusieurs débiteurs se divise de droit entr'eux, et que si l'un d'eux a payé une pareille dette il ne peut recouvrer de ses co-débiteurs que leur part proportionnelle. Que les appelants, demandeurs en garantie, n'ont pas de recours solidaire contre les créanciers pour se faire indemniser des condamnations qui pourraient être prononcées contre eux.—Q. B.—*Chinic & Ross*, 13 Q. L. R., p. 297.

1118. The codebtor of a joint and several debt who has paid it in full, can only recover from the others the share and portion of each of them, even though he be specially subrogated in the rights of the creditors.

If one of the codebtors be found insolvent, the loss occasioned by his insolvency, is divided by contribution among all the others, including him who has made the payment.—*ff* 4, L. 36, 39, *De fidejuss. et mand.*; *ff* L. 46, *De solutionibus*; Pothier, 264, 281, 282; Domat, *loc. cit. suprà*; C. N., 1214. [I. 83.]

DECISION:—A *fidéjusseur* has his action against a *cofidéjusseur* for his proportion of the sum which he has paid for their common principal, but if there be no convention to the contrary in the deed by which he became security, his action is only for money paid, and consequently, he can have no mortgage upon the property of the *cofidéjusseur* until he has obtained a judgment, and then only from the date of that judgment.—K. B.—*Jones vs Laing*, Stuart's Rep., p. 125.

1119. In case the creditor have renounced his joint and several action against one of the debtors, if one or more of the remaining codebtors become insolvent, the shares of those who are insolvent are made up by contribution by all the other codebtors, except the one so discharged whose part in the contribution is borne by the creditor. —Pothier, 278, 281; 6 Toul., n. 739; 4 Marc., on art. 1215; Delv., p. 144, n. 6; 11 Dur., n. 231; 3 Zachariæ, p. 361, n. 21; C. N. 1215. [I. 83.

Digitized by Google

1120. If the matter for which the debt has been contracted jointly and severally concern only one of the codebtors, he is liable for the whole toward his codebtors, who, with regard to him, are considered only as his sureties.—Pothier, 264, 282, 495; C. N., 1216. [I. 83.]

SECTION V.—OF DIVISIBLE AND INDIVISIBLE OBLIGATIONS.

1121. An obligation is divisible when it has for its subject a thing which in its delivery or performance is susceptible of division either materially or intellectually.—*ff* L. 2, § 1, *De verb. oblig*; *ff* L. 9, § 1, *De solutione*; Dumoulin, *Tract. de divid. et indiv.*, partie 1ère, n. 5; partie 2ème nn. 200, 201; Pothier, *Oblig.*, 288, 289; *Success.*, c. 5, art. 3. § 5; C. N., 1217. [I. 83.]

DECISION:—The obligation of proprietors of real estate to pay taxes to the City of Montreal is indivisible and joint and several, and the City can sue for the payment of the whole amount of the taxes due thereon, the person whose name is inscribed on the roll or any other proprietor *par indivis*.—TELLIER, J.—*City of Montreal vs Cassidy*, M. L. R., 4 S. C., p. 32.

1122. A divisible obligation must be performed between the creditor and the debtor, as if it were indivisible. The divisibility takes effect only with their heirs or legal representatives, who, on the one hand, cannot enforce the obligation, and, on the other, are not held for the performance of it, beyond their respective shares as representing the creditor or the debtor.—Cod., L. 2, *De hæreditariis action*, *ff* L. 33, *De legatis*, 2; Pothier, *Oblig.*, 299, 498, 311, 316, 317, *Rente*, ch. 7, art. 3; C. N., 1220. [I. 83.]

DECISIONS:—1. Les propriétaires par indivis de l'héritage hypothéqué au paiement des arrérages d'une rente, ne sont pas tenus solidairement au paiement de ces arrérages.—Q. B.—*Pappans & Turcotte*, 8 L. C. J., p. 152.

2. A creditor cannot divide his claim so as to subject the debtor to several actions on one contract.—MEREDITH, C. J.—*Légaré vs Queen Insce. Co*, 18 L. C. J., p. 134.

1123. The rule established in the last preceding article is subject to exception with respect to the heirs and legal representatives of the debtor, and the obligation must be performed as if it were indivisible, in the three following cases:

1. When the object of the obligation is a certain specific thing of which one of them is in possession;

2. When one of them alone is charged by the title with the performance of the obligation;

Digitized by Google

3. When it results either from the nature of the contract or of the thing which is the object of it, or from the end proposed by it that the intention of the contracting parties was that the obligation should not be performed in parts.

[In the first case, he who possesses the thing due,—in the second case, he who is alone charged,—and in the third case, each of the coheirs or legal representatives, may be sued for the whole thing due; saving in all cases the recourse of the one sued against the others.]—*ff* L. 85, *De verb. oblig.*; L. 80, § 1, *ad legem Falcidiam;* Dumoulin, *De divid. et individ.*, part. 2, nn. 20, 30, 33; Pothier, 302, 303, 307, 315; 4 Marcadé, nn. 640-2; Rodier, *ob. div. et indiv.*, n. 329 et seq; C. N., 1221. [I. 85.]

1124. An obligation is indivisible:

1. When it has for its object something which by its nature is not susceptible of division, either materially or intellectually;

2. When although the object of the obligation is divisible by its nature, yet from the character given to it by the contract, this object becomes insusceptible not only of performance in parts but also of division.—See authorities under C. C. 1122; Pothier, 241, 242, 293, 294, 295; 4 Marcadé, pp. 627, 635; Rodière, *loc. cit.*; C. N., 1217, 1218. [I. 85.]

DECISION:—Qu'un usufruit donné à conjoints ne peut être divisé de manière à faire offrir aux enchères publiques la part du mari et à la faire attribuer par adjudication à un étranger qui jouirait ensuite conjointement avec la femme.—Q. B.—*Bodard & Anctil*, 13 Q. L. R., p. 67.

1125. The stipulation of joint and several liability does not give to an obligation the character of indivisibility.—Dumoulin, *De dividuo et individuo*, part. 2, n. 222; Pothier, 287, 323, 324; C. N., 1219; C. L., 2106. [I. 85.]

1126. Each one of those who have contracted an indivisible obligation is held for the whole although the obligation have not been contracted jointly and severally.—*ff* L. 2. §§ 1, 2, 4, *De verb. oblig.*; Pothier, 322, 323; C. N., 1222; C. L., 2109. [I. 85.]

1127. The rule established in the last preceding article prevails also with regard to the heirs and legal representatives of him who has contracted an indivisible obligation.—*ff* L. 192, *De reg. jur.*; *ff* L. 80, 1, *Ad legem Falcidiam*; *ff* L. 2, § 2, *De verb. oblig.*; Pothier, *Oblig.* 322, *Success.*, ch. 5, art. 3, § 5; C. N., 1223; C. L., 2110. [I. 87.]

Digitized by Google

1128. The obligation to pay damages resulting from the non-performance of an indivisible obligation is divisible.

But if the non-performance have been caused by the fault of one of the codebtors, or of one of the coheirs or legal representatives, the whole amount of damages may be demanded of such codebtor, heir or legal representative.—*ff* L. 85, § 5, L. 139, *De verb. oblig.*; Pothier, *Oblig.*, 304, 305, 324, 334, *Success.*, ch. 5, art. 3, § 5. [I. 87.]

1129. Each coheir or legal representative of the creditor may exact in full the execution of an indivisible obligation.

He cannot alone release the whole of the debt, or receive the value instead of the thing itself; if one of the coheirs or legal representatives have alone released the debt or received the value of the thing, the others cannot demand the indivisible thing without making allowance for the portion of him who has made the release or who has received the value.—*ff* L. 25, § 9, *Familiæ erciscundæ*; *ff* L. 2, *De verb. oblig.*; *ff* L. 13, § 12, *De acceptilationibus*; Pothier, 326-7-8-9; 4 Marcadé, 497-8; C. N., 1224; C. L., 2111. [I. 87.]

1130. The heir or legal representative of the debtor sued for the whole of an indivisible obligation may demand delay to make the coheirs or other legal representatives parties to the suit, unless the debt is of such a nature that it can be discharged only by the one so sued, who may in such case be condemned alone, saving his recourse for indemnity against the others.—*ff* L. 11, § 23, *De legatis*, 3; Dumoulin, *De divid. et individ.*, part. 3, nn. 90, 100, 104, 107, part. 2 nn. 175, 469; Pothier, 330, 331, 333, 334, 335; C. N., 1225. [I. 87.]

SECTION VI.—OF OBLIGATIONS WITH A PENAL CLAUSE.

1131. A penal clause is a secondary obligation by which a person, to assure the performance of the primary obligation, binds himself to a penalty in case of its inexecution.—*ff* L. 71, 137, § 7, *De verb. oblig.*; *ff* L. 44, § 5, *De oblig. et action.*; *ff* L. 13, § 2, *De rebus dubiis*; *ff* L. 41, 42, *Pro sociis*; *ff* L. 28, *De actione empti et venditi*; Pothier, 184, 337, 342; Domat, liv. 1, tit. 1, sec. 4, n. 18; C. N., 1226. [I. 87.]

DECISIONS:—1. In an action of damages for the non-performance of a specific agreement, in which a penalty is stipulated to be paid by the party failing, the penalty is not to be considered as stipulated damages, and therefore whatever loss is proved to have been sustained, whether beyond, below, or equal to the value of the penalty, the plaintiff will have judgment for.—K. B.—*Mure vs Wileys* Pyke's Reports, p. 61, 2 R. de L., p. 207.

Digitized by Google

2. A sum fixed by way of penalty in case of non-performance of a contract, cannot be considered as preliquidated damages, if it be not distinctly stated to be so.—K. B.—*Patterson vs Farran*, 2 R. de L., p. 124.

3. A party who has submitted a matter to arbitrators cannot, after the arbitrators have made their award, call for the decisions of the ordinary tribunals, without, in the first instance, paying the penalty stipulated in the arbitration bond, unless the award be absolutely null. An award is not absolutely null, although the witnesses examined have not been legally sworn.—C. R.—*Tremblay vs Tremblay*, 3 L. C. R., p. 482.

4. A covenant in an obligation that, in default of payment of interest within thirty days from the period at which such interest becomes due, the whole of the debt, with the interest shall become immediately exigible, is not comminatory and, on such default, judgment will be rendered for principal and interest.—BERTHELOT, J.—*McNevil vs Board of Arts*, 12 L. C. R., p. 335.

5. La prestation suivante portée dans un acte de donation entrevifs de père à fils, " que si le donataire venait à vendre, échanger ou donner le dit terrain à des étrangers ou à faire quelqu'autre acte équipollent à vente, il sera tenu et obligé tel qu'il le promet en ces présentes, de bailler et payer aux dits donateurs seulement la somme de deux mille livres ancien cours, le jour de la passation, soit des actes de vente, échange, donation et autres actes équipollents à vente," n'est pas comminatoire, mais elle est réputée être une charge de la donation, exigible sitôt que la terre a été vendue au défendeur, un étranger.—BADGLEY, J.—*Cheval vs Morin*, 6 L. C. J., p. 229.

6. C'est par exception péremptoire en droit temporaire, et non par exception dilatoire, que le défendeur doit invoquer le moyen résultant du non-paiement avant l'institution de l'action, de la peine compromissoire.—BERTHELOT, J.—*Allard vs Benoît*, 16 L. C. J., p. 79.

See cases noted at C. C. 1076.

1132. The nullity of the primary obligation for any other cause than want of interest, carries with it that of the penal clause. The nullity of the latter does not carry with it that of the primary obligation.—*ff* L. 97, *in pr.*; L. 126, § 3, *De verb. oblig.*; Pothier, 339, 340; 6 Toullier, 815; C. N., 1227. [I. 87.]

1133. The creditor may enforce the performance of the primary obligation, if he elect so to do, instead of demanding the stipulated penalty;

But he cannot demand both, unless the penalty has been stipulated for a simple delay in the performance of the primary obligation.—*ff* L. 10, § 1, *De pactis*; *ff* L. 132, § 2, *De verb. oblig.*; *ff* L. 28, *De actione empti et venditi*; Pothier, 343, 344; C. N., 1228, 1229. [I. 89.)

DECISION :—Que le créancier n'a droit de poursuivre l'exécution de l'obligation principale et de demander la peine stipulée que dans le cas où la peine a été stipulée pour le simple retard dans l'exécution, et que la grande disproportion

Digitized by Google

entre la peine et l'obligation principale détruit toute présomption qu'elle aurait été stipulée en dédommagement du retard.—Q. B.—*Lépine & Fiset*, 10 R. L., p. 153.

See also cases noted at C. C. 1067 & 1079.

1134. The penalty is not incurred until the debtor is in default of performing the primary obligation, or has done the thing which he had obliged himself not to do.—C. N., 1230. [I. 89.]

1135. [The amount of penalty cannot be reduced by the court. But if the obligation have been performed in part to the benefit of the creditor, and the time fixed for its complete performance be not material, the penalty may be reduced; unless there is a special agreement to the contrary.]—Domat, liv. 1, tit. 1, sec. 4, n. 18; 6 Toullier, 809, 810, 811, 812, 813; 4 Marcadé, pp. 654, 526, 527; C. N., 1152, 1231; C. L., 2123; Citations in Pothier, 345. [I. 89.]

DECISION:—Malgré une clause pénale, en cas de retard de la part d'un propriétaire à livrer une maison louée, il est loisible au tribunal de réduire cette peine, s'il appert que le locataire n'a souffert aucun dommage de ce retard, même quand l'obligation principale n'aurait pas été exécutée en partie.—BERTHELOT, J.—4 R. L., p. 411.

1136. When the primary obligation contracted with a penal clause is indivisible, the penalty is incurred upon the contravention of it by any one of the heirs or other legal representatives of the debtor; and it may be demanded in full against him who has contravened it, or against each one of them for his share and portion, and hypothecarily for the whole; saving their recourse against him who has caused the penalty to be so incurred.—*ff* L. 5, § 1, L. 84, § 3, *De verb. oblig.*; Dumoulin, part. 3, nn. 173, 174; Pothier, 355, 366; C. N., 1232; Sedgwick, *On measure of damages*, pp. 421 et seq. [I. 89.]

1137. When the primary obligation contracted under a penalty is divisible, the penalty is incurred only by that one of the heirs or other legal representatives of the debtor who contravenes the obligation, and for the part only for which he is held in the primary obligation, without there being any action against those who have executed it.

This rule suffers exception when, the penal clause having been added with the intention that the payment could not be made in parts, one of the coheirs or other legal representatives has prevented the execution of the obligation for the whole; in this case he is liable for the entire penalty and the others are liable for their respective

Digitized by Google

shares only, saving their recourse against him.—*ff* L. 2, §§ 5, 6; L. 72, *De verb. oblig.*; Pothier, 306, 359, 360, 361; Dumoulin, part. 3, n. 412; 6 Toullier, nn. 842, 843, 844, 845; C. N., 1218, 1233. [I. 89.]

CHAPTER EIGHTH.

OF THE EXTINCTION OF OBLIGATIONS.

SECTION I.—GENERAL PROVISIONS.

1138. An obligation becomes extinct:
By payment;
By novation;
By release;
By compensation;
By confusion;
By the performance of it becoming impossible;
By judgment of nullity or rescission;
By the effect of the resolutive condition, which has been explained in the preceding chapter;
By prescription;
By the expiration of the time limited by law or by the parties for its duration;
By the death of the creditor or debtor in certain cases;
By special causes applicable to particular contracts which are explained under their respective heads.—C. N., 1234. [I. 91.]

SECTION II.—OF PAYMENT.

§ 1. *General provisions.*

1139. By payment is meant not only the delivery of a sum of money in satisfaction of an obligation, but the performance of any thing to which the parties are respectively obliged.—Domat, liv. 4, tit. 1, sec. 1, nn. 1, 3; Pothier, 458-495; C. L., 2127. [I. 91.]

DECISION:—Under a general plea of payment, the defendant cannot prove that he bought a note due by the plaintiff to a third party and that the plaintiff agreed that the defendant's debt should be considered settled, by reason of the

Digitized by Google

plaintiff's note so purchased by the defendant.—C. R.—*Bruneau vs Gagnon*, 1 Q. L. R., p. 195.

1140. Every payment presupposes a debt; what has been paid where there is no debt may be recovered.

There can be no recovery of what has been paid in voluntary discharge of a natural obligation.—*ff* Leg. 1, 10, 13, 14, 16, 17, 18, *De condict. indeb.*; *ff* L. 176, *De verb. signif.*; Pothier, 192, 195, 218; Domat, liv. 2, tit. 7, sec. 1, nn. 1, 4, 5; Domat, liv. 4, tit. 1, sec. 1, nn. 4, 5; C. L., 2129; C. N., 1235. [I. 91.]

DECISIONS:—1. An *erreur de droit* may give rise to an action for the recovery back of money paid. In the case submitted, a party who voluntarily paid a tax imposed by a by-law of municipal corporation, which by law is declared by the court to be void, has a right to recover back what he has so paid.—Q. B.—*Leprohon & City of Montreal*, 2 L. C. R., p. 180.

2. Que celui qui paie volontairement à un notaire le montant d'un compte qu'il lui a présenté, n'a pas le droit, si plus tard il est établi que la valeur des services rendus est au-dessous du montant du compte, de recouvrir la différence. —Q. B.—*Fradet & Guay*, 11 R. L., p. 531.

3. Que l'obligation consentie avant l'acte seigneurial de 1854, de payer au seigneur une rente constituée, pour la commutation des lots en vente, s'est trouvé éteinte par le paiement de l'indemnité par le gouvernement au seigneur. (Cette cause peut, même aujourd'hui, avoir son application, quant à ce qui concerne l'extinction des obligations.)—Q. B.—*Lalonde & Brunet dit Bourbonnais*, 12 R. L., p. 594.

See also cases noted at C. C. 992.

1141. Payment may be made by any person, although he be a stranger to the obligation, and the creditor may be put in default by the offer of a stranger to perform the obligation on the part of the debtor without the knowledge of the latter, but it must be for the advantage of the debtor and not merely to change the creditor that the performance of the obligation is so offered.—*ff* L. 23, 31, 40, 53, *De solutionibus*; Domat, liv. 4, tit. 1, sec. 1, n. 7, sec. 3, n. 2, sec. 2, n. 10; Pothier, 499, 500, 598 or 463, 464, 562; C. N., 1236, 1237. [I. 91.]

DECISION:—Where a person instructed a bank clerk to give a cheque for the amount of a certain account and the clerk late at night gave the party the money instead, thereby preventing his principal from rectifying an error which existed in the account, it was held that the clerk could not recover from the principal the amount paid in excess of what was really due.—Q. B.—*Shea & Prendergast*, M. L. R., 3 Q. B., p. 439.

1142. If the obligation be to do something which the creditor has an interest in having done by the debtor himself, the obligation

Digitized by Google

cannot be performed by a stranger to it without the consent of the creditor.—*ff* L. 72, § 2, *De solution.*; Pothier, 500; 6 Toullier, n. 11; Ord. 1673, tit. 5, art. 3; C. L., 2131. [I. 91.]

1143. Payment to be valid must be made by one having a legal right in the thing paid which entitles him to give it in payment.

Nevertheless if a sum of money or other thing of a nature to be consumed by use be given in payment, it cannot be reclaimed from the creditor who has consumed it in good faith, although the payment have been made by one who was not the owner nor capable of alienating it.—*ff* L. 54, *De reg. jur.*; L. 14, § *fin.*, L. 94, *De solut.*; Pothier, 495, 496, 497, 498, 504, 540 or 459, 460, 461, 560; 6 Toullier, n. 6, p. 14; 4 Marc., on art. 1238; C. N., 1238. [I. 93.]

1144. Payment must be made to the creditor or to some one having his authority, or authorized by a court of justice or by law to receive it for him.

Payment made to a person who has no authority to receive it is valid, if the creditor have ratified the payment or profited by it.—*ff* L. 180, *De reg. jur.*; L 12, *in prin.*, § 4, L. 49, L. 15, *De solution. et liberation.*, Pothier, 501, 536, 538 et seq or 242, 465, 470, 472 et seq.; C. L., 2136; C. N., 1239. [I. 93.]

DECISIONS:—1. Que le procureur *ad litem* ne peut, comme tel, recevoir les sommes pour lesquelles sa partie a obtenu jugement et en donner valables quittances.—CIMON, J.—*Cloran vs McClanaghan*, M. L. R., 1 S. C., p. 331.

2. W. agreed to lend D. $2,000 which she deposited in the hands of J., her notary, with instructions not to pay over the same until the deed was signed and registered. D. signed the deed and caused it to be registered after which he furnished a list of his creditors to J. with directions to pay them certain amounts as therein indicated. J. paid these amounts except $346.49 due G., for which G. brought an action against W. *Held*:—That W. was liable to G. for the amount.—Q. B.—*Webster & Dufresne*, 31 L. C. J., p. 100, 15 R. L., p. 210, M. L. R., 3 Q. B., p. 43.

1145. Payment made in good faith to the ostensible creditor is valid, although it be afterwards established that he is not the rightful creditor.—Pothier, 503 or 467; C. L., 2141; C. N., 1240. [I. 93.]

1146. Payment is not valid if made to a creditor who is incapable by law of receiving it, unless the debtor proves that the thing paid has turned to the benefit of such creditor.—*ff* L. 15, L. 47, *De solut. et liberat.*; Pothier, 504, 509, or 468-473; C. L., 2143; C. N., 1241. [I. 93.]

Digitized by Google

1147. Payment made by a debtor to his creditor to the prejudice of a seizure or attachment is not valid against the seizing or attaching creditors, who may, according to their rights, constrain the debtor to pay a second time; saving, in such case, only his remedy against the creditor so paid.—Pothier, *Oblig.*, 505 or 469, *Const. de rente*, 87; C. L., 2145; C. N., 1242. [I. 93.]

1148. A creditor cannot be compelled to receive any other thing than the one due to him, although the thing offered be of greater value than the thing due.—*ff* L. 2, §1, *De rebus creditis*; Domat, liv. 4, tit. 1, sec. 2, n. 9; Pothier, 243, 465; C. N., 1243. [I. 93.]

1149. A debtor cannot compel his creditor to receive payment of his debt in parts, even if the debt be divisible.—*ff* 1, L. 21, *De rebus creditis; ff* L. 41, § 1, *De usuris*; C. S. L. C., c. 83, s. 199; c. 94, s. 37; C. N., 1244. [I. 93.]

[Nor can the court in any case by its judgment order a debt actually payable to be paid by instalments without the consent of the creditor.] [I. 95.]

DECISION:—Que l'entrepreneur de réparations suivant marché et devis ne peut recouvrer le prix des travaux qui, d'après le marché, n'était payable qu'après leur confection s'il n'a pas pleinement exécuté son obligation de faire, et qu'un arrêt qui lui accorde une somme moindre que celle demandée, détruisant la valeur des travaux à faire pour remplir son obligation, viole la convention des parties et la loi.—C. R.—*Saumure vs Commissaires d'Ecole pour la Municipalité de la Paroisse de St Jérôme*, 16 R. L., p. 214.

1150. The debtor of a certain specific thing is discharged by the delivery of the thing in the condition in which it is at the time of delivery, provided that the deterioration in the thing has not been caused by any act or fault for which he is responsible, and that previously to the deterioration he was not in default.—*ff* L. 23, 33, 37, 51, *De verb. oblig.; ff* L. 33, *De solution;* Pothier, 544 or 508; C. L., 2151; C. N., 1245. [I. 95.]

1151. If the object of the obligation be a thing determined in kind only, the debtor cannot be required to give a thing of the best quality, nor can he offer in discharge one of the worst.

The thing must be of a merchantable quality.—*ff* L. 33, *De solut. et liberat;* Pothier, 283-4; C. L., 2152; C. N., 1246. [I. 95.]

DECISION:—La convention de fournir une quantité *du meilleur blé qui poussera sur la terre donnée*, oblige le donataire à fournir du bon blé: si celui que la terre a produit n'est pas bon, le donataire devra en acheter.—Q. B.—*Lalonde & Cholette*, 1 R. L., p. 700.

Digitized by Google

1152. Payment must be made in the place expressly or impliedly indicated by the obligation.

If no place be so indicated, the payment, when it is of a certain specific thing, must be made at the place where the thing was at the time of contracting the obligation.

In all other cases payment must be made at the domicile of the debtor; subject, nevertheless, to the rules provided under the titles relating to particular contracts.—*ff* L. 9, *De eo quod certo loco ; ff* L. 21, *De oblig. et action*; Pothier, 238, 239, 240, or 548, 549; C. L., 2153; C. N., 1247. [I. 95.]

DECISIONS: A promise to pay at a specified place is not a promise to pay generally and there is no liability on the part of the maker of a promissory note payable at a specified place, unless proof be given of a presentment and a demand of payment at such specified place and of the neglect or refusal there to pay the amount of such note.—Q. B.—*O'Brien & Stevenson*, 15 L. C. R., p. 265.

2. Un billet promissoire, payable généralement, doit être présenté pour paiement, au domicile du faiseur, avant la demande judiciaire, pour que le demandeur ait ses frais contre le défendeur, au cas où ce dernier, avec sa défense, offre le montant réclamé.—POLETTE, J.—*Mineault vs Lajoie*, 9 R. L., p. 382.

3. Where a person made a note *en brevet*, payable at his domicile, it was held that the creditor was bound to make demand of payment at the place specified, and an application by the debtor for an extension of time was not a waiver of his right to pay at such place.—Q. B.—*Dorion & Benoit*, 2 L. N., p. 171.—JOHNSON, J.—1 L. N., p. 350.

4. Lorsque le lieu de paiement n'est pas indiqué dans l'obligation, il doit se faire au domicile du débiteur, même si le débiteur et son créancier restent dans la même ville.—Q. B.—*Rodrigue & Grondin*, 6 R. L., p. 643.

5. Que le loyer est quérable.—Q. B.—*Hubert vs Dorion*, 16 L. C. J., p. 53.

6. Where money is payable at the domicile of the debtor, demand of payment must be made there before interest can accrue thereon.—A payment of the capital so due to a party indicated by the creditor, although after the date at which it fell due, is sufficient to prevent the accruing of the interest thereon. —C. R.—*O'Halloran vs Kennedy*, 18 L. C. J., p. 284.

7. Un débiteur qui veut se prévaloir du défaut de demande préalable à son domicile, lorsque la dette est payable chez lui, doit consigner en cour le montant de sa dette.—C. R.—*Smallwood vs Allaire*, 21 L. C. J., p. 106.

8. Where a debt is payable at the debtor's domicile, he cannot, when sued for the debt, simply ask the dismissal of the action, on the ground that no previous demand of payment was made at his domicile, but he should tender the money with his plea.—DORION, J.—*Mallette vs Hudon*, 22 L. C. J., p. 101.

9. Un défendeur dont la créance est payable à son bureau, ou domicile, qui aurait été poursuivi, et qui aurait déposé en cour le montant réclamé de lui, alléguant qu'aucune demande de paiement ne lui avait été faite avant l'institution de l'action, sera cependant condamné à lui payer le montant déposé, mais sans frais.—CREBASSA, J.—*Crebassa vs La Cie du chemin de fer du Sud Est*, 8 R. L., p. 722.

10. Where, by the lease, domicile is elected by the lessee at the premises

Digitized by Google

leased, the rent is payable there, and if no demand of payment have been made, prior to the suit, at such domicile, the action will be dismissed, provided defendant show that he was ready to pay his rent there and bring the money into Court.—DORION, J.—*Hearn & McGolrick*, 3 Q. L. R., p. 368.

11. Que lorsque le paiement doit se faire en la demeure du créancier et que le créancier décède avant de recevoir son paiement, le débiteur ne peut déposer le montant dû entre les mains du protonotaire et poursuivre les créanciers pour sa décharge, mais qu'il doit mettre légalement les héritiers du créancier en demeure de se rendre au lieu convenu pour y recevoir paiement. Que s'il y a des absents parmi les héritiers, le débiteur doit se prévaloir de l'acte des dépôts judiciaires, Q. 35 V. cap. 5, as amended by 36 V., c. 15 and 43-44 V., cap. 8.—PAPINEAU, J.—*Ménard vs Lussier*, 7 L. N., p. 59.

12. Que la demande faite par une lettre d'avocat dans le cours ordinaire de l'exercice de la profession, est une mise en demeure suffisante et est d'accord avec les exigences de l'article 1152 du Code Civil.—GILL, J.—*Guimond vs Léonard*, 8 L. N., p. 171.

13. Que lorsqu'il n'y a pas d'endroit fixé par l'obligation, la demande de paiement doit être faite par le créancier au domicile du débiteur, sans que ce dernier soit tenu d'avertir le créancier quand il sera prêt à payer.—Q. B.—*Beaudry & Barbeau*, 1 Q. B. R., p. 268.

14. Qu'un marchand qui poursuit son compte pour marchandises vendues et livrées, est tenu comme dans les cas ordinaires, de faire, personnellement ou par procureur, avant l'action, une demande de paiement au domicile du débiteur, et que la demande faite par lettre du marchand, par envoi du compte ou par lettre d'avocat est insuffisante. Que la coutume ou l'usage du commerce ne peut prévaloir contre une disposition formelle de la loi.—JETTÉ, J.—*Smardon vs Lefebvre*, M. L. R., 1 S. C., p. 387.

1153. The expenses attending payment are at the charge of the debtor.—Pothier, 550 or 514; Nouv. Ferrière, vo. *Paiement*, n. 493; C. N., 1248. [I. 95.]

§ 2. *Of payment with subrogation.*

1154. Subrogation in the rights of a creditor in favor of a third person who pays him, is either conventional or legal.—Renusson, *Subrogation*, ch. 2, xxii; C. N., 1249. [I. 95.]

1155. Subrogation is conventional:

1. When the creditor, on receiving payment from a third person, subrogates him in all his rights against the debtor. This subrogation must be express and made at the same time as the payment.

2. When the debtor borrows a sum for the purpose of paying his debt, and of subrogating the lender in the rights of the creditor. It is necessary to the validity of the subrogation in this case, that the act

Digitized by Google

of loan and the acquittance be notarial [or be executed before two subscribing witnesses ;] that in the act of loan it be declared that the sum has been borrowed for the purpose of paying the debt, and that in the acquittance it be declared that the payment has been made with the moneys furnished by the new creditor for that purpose. This subrogation takes effect without the consent of the creditor.

[If the act of loan and the acquittance be executed before witnesses, the subrogation takes effect against third persons from the date only of their registration, which is to be made in the manner and according to the rules provided by law for the registration of hypothecs.]—*ff* L. 24, § 3, *De rebus auctoritate judicis* ; Pothier, *Cout. d'Orl. Intr. au tit.* 20, nn. 78, 80, 81 ; Renusson, c. 10, nn. 5, 6, 7, 12, 13, 14, 22, 23 ; Domat, liv. 4, tit. 1, s. 1, n. 9 ; Décl. de Henry IV, de mai 1609 and the *règlement et arrêté de subrogation de 1690 ;* C. N., 1250. [I. 97.]

DECISIONS :—1. A deed by which it is declared that the payment made by a debtor is so made with the moneys of a third party, borrowed upon the condition of subrogating such third party in the rights of the creditor and that such declaration is made for the purpose of effecting such subrogation (the third party not being present at the execution of the deed) does not effect a subrogation in favour of such party, by reason of want of acceptance on his part, nor does the stipulation to that effect with the debtor effect subrogation by reason of the absence of an authentic instrument as evidence of the loan and of its object at a period anterior to the payment. Also, that the allegation, in an opposition, of a parol contract anterior to the payment that the moneys were loaned to the debtor upon condition that the tender should be subrogated in the rights of the creditor, cannot be taken as admitted although such opposition is not contested, upon the principle that a contract of such a character would only be proved by an authentic instrument which would render certain the period at which the loan was made and, lastly, that the acceptance subsequently made by the lender of the assignment of the rights of the original creditor is inoperative to effect the subrogation, because the original debt was completely extinguished at the time of the payment.—Q. B.—*Filmer & Bell*, 2 L. C. R., p. 130.

2. A party paying a debt for which he was liable with others and obtaining a subrogation *sous seing privé*, may sue his co-debtors for their share of the debt, in the name of the original creditor.—Monk, J.—*Berthelet vs Dease*, 12 L. C. J., p. 336.

3. The subrogation in the hypothecary rights of a creditor granted to the universal legatee of the debtor who pays his share of the hypothecary debt, cannot avail against the hypothecary rights of a subsequent hypothecary creditor whose hypothec has been duly registered.—Q. B.—*Lafleur & Bertrand*, 20 L. C. J., p. 1.

4. Subrogation, either conventional or legal, cannot take place, except in favor of a third party who pays the debt of another.—Q. B.—*Stewart & Metropolitan Building Society*, 1 Q. B. R., p. 324.

5. The Respondent paid to the Appellant a debt due to M., and took a sub-

Digitized by Google

rogation of their claim. He sued M., and the Appellant had knowledge of the action and furnished the names of witnesses to prove the debt, but the Respondent obtained judgment for part only. *Held*:—That Respondent was entitled to recover the balance from Appellant, but as he had not called Appellant in as *garant*, Respondent was not entitled to recover the costs incurred in the suit against M.—Q. B.—*Carreau & McGinnis*, 3 L. N., p. 362.

6. Que la subrogation consentie par le débiteur, conformément au paragraphe 2 du C. C. 1155, est valable à l'encontre du tiers-détenteur qui a acquis la propriété avant la subrogation. Qu'il n'est pas nécessaire que le prêteur accepte la subrogation faite sous cet article.—GILL, J.—*Chapdelaine vs Chevalier*, 10 R. L., p. 687.

7. Under the Code, where the payment is made by the debtor with borrowed money, the subrogation of the lender does not require to be made simultaneously with the payment.—PRIVY COUNCIL.—*Renny & Moat*, 4 L. N., p. 195. (Not reported in App. Cas.)—Q. B.—2 L. N., p. 97.

8. Que la subrogalion conventionnelle doit être faite en même temps que le paiement et que le débiteur qui a payé un jugement obtenu par un créancier contre lui et un co-débiteur ne peut faire exécuter ce jugement contre son co-débiteur au nom du créancier, s'il n'a été subrogé aux droits du créancier qu'après le paiement du jugement.—CHAGNON, J.—*McDonald vs Carreau*, 16 R. L., p. 94.

1156. Subrogation takes place by the sole operation of law and without demand:

1. In favor of a creditor who pays another creditor whose claim is preferable to his by reason of privilege or hypothec;

2. [In favor of the purchaser of immoveable property who pays a creditor to whom the property is hypothecated;

3. In favor of a party who pays a debt for which he is held with others or for others, and has an interest in paying it;]

4. In favor of a beneficiary heir who pays a debt of a succession with his own moneys;

5. When a rent or debt due by one consort alone has been redeemed or paid with the moneys of the community; in this case the other consort is subrogated in the rights of the creditor according to the share of such consort in the community.—Cout. de Paris, art. 244, 245; Renusson, c. 4, *fin;* Pothier, *Cout. d'Orl. Intr. au titre* 20, nn. 71, 72, 73, *Constitution de Rente*, 176, *Hypothèques*, c. 2, s. 1, *art.* 2, § 6, *Oblig.* 280, 281, 520, 521, 522 or 536, 537, 538; Renusson, c. 7, n. 68; c. 9, n. 7; Arrêt du 26 août, 1706; 5 Journal des Audiences; 1 Duplessis, *Cout. de Paris.* art. 244, 245, ch. 2, s. 3, p. 450; Lemaître, pp. 239, 240, 241 *on the art.* 244, 245, *Cout. de Paris;* Lebrun, Com. lib. 3, c. 2, s. 1, nn. 13 et seq, p. 409; 2 Lebrun, p. 46, n. 19, Ed. 1775; 7 Toullier, 142 et seq; 4 Marcadé, pp. 710, 711; 12 Duranton, n. 146 et seq; C. N., 1251. [I. 97 to 99.]

Digitized by Google

DECISIONS:—1. If one of two *co-donataires* pay the whole of an annuity to the donateur, he can maintain an action for one half of the sum paid against the other.—K. B.—*Patris vs Bégin*, I R. de L., p. 346.

2. One of several *co-débiteurs* who has paid the debt for which they were all bound, without a subrogation from the creditor, can mantain an action *negotiorum gestorum*, for money paid and advanced, against each of his co-debtors, and recover from each, his *portion virile*; viz: one third of the sum which he has paid.—K. B.—*Audy vs Ritchie*, 2 R. de L., p. 31.

3. Assurers against fire have a legal right, on paying the loss covered by their policy, to be subrogated in the rights and actions of the assured against the originators of the fire and loss.—A *marguillier en charge* having power to receive from the assurers the sum insured on the property of the *Fabrique* and to grant a discharge therefor, has also the power to subrogate the assurers in the rights and actions of the *Fabrique* against the originators of the fire and loss, although he cannot legally make an assignment by way of sale of any such rights and actions without special authority. Assurers substituted, on payment of the loss in the rights and actions of the assured, can mantain an action against the originators of the fire and loss for such part.—PRIVY COUNCIL.—*Quebec Fire Insce. Co. & Molson*, 1 L. C. R., p. 222. (Not reported in Moore's P. C. Rep.)

4. Sur un jugement rendu solidairement contre deux associés, pour une dette personnelle à l'un d'eux, le paiement fait par le débiteur personnel libère son co-associé, et celui qui a payé ne peut alors se faire subroger anx droits du demandeur, mais doit, s'il a des réclamations contre son associé, procéder directement par une action *pro socio*.—BADGLEY, J.—*Leduc vs Turcotte*, 5 L. C. J., p. 96.

5. Une dette payée par une femme commune en biens avec son mari, est payée pour le compte de la communauté, qui en devient créancière, si c'était la dette d'un tiers. Celui qui paie pour un tiers a droit de recouvrer du débiteur le montant ainsi payé. La mention dans l'acte de quittance, que l'argent avait été payé par la femme quelques mois auparavant rend-elle nulle la subrogation accordée par le créancier dans ses droits d'hypothèques ?—Q. B.—*Gaudry & Bergevin*, 2 R. L., p. 115.

6. The endorser of a promissory note, tendering the amount to the payee, does not require and cannot demand any special subrogation, besides the surrender of the note. Further, the endorser cannot throw upon the payee refusing tender of the amount the liability for the maker's insolvency, unless he has renewed the tender *en justice*.—Q. B.—*Bove & McDonald*, 1 L. C. L. J., p. 55.

7. Avant le Code, la subrogation légale, sans demande, était accordée à l'acquéreur qui employait son prix au paiement des créanciers auxquels cet héritage était hypothéqué, et qui était ensuite évincé pour cause non dérivant de lui, et ce quand même il aurait été chargé par son acte d'acquisition de payer tels créanciers. La revente volontaire par le premier acquéreur, après avoir ainsi payé les créanciers inscrits, l'éviction par vente judiciaire sur le second acquéreur, à la demande de créanciers hypothécaires antérieurs à l'acquisition du premier acheteur, n'ont pas eu pour conséquence de nullifier la subrogation.—SICOTTE, J.—*Lavallée vs Tétreau*, 17 L. C. J., p. 248.

8. Subrogation cannot be allowed under article 1156 of the Civil Code, unless it appears that the person who claims the subrogation paid the debt in relation to which he claims such subrogation.—C. R.—*Chinic vs Canada Steel Co.*, 3 Q. L. R., p. 1.

Digitized by Google

9. A special mortgagee, third in rank, obtaining legal subrogation in the rights of a general mortgagee, first in rank, covering the same and other property, would not be allowed to use his recourse so as to defeat the equities of a second mortgagee, if the mortgagee first in rank were amply secured on the other property affected by it.—Q. B.—*Saunders & Commercial Mutual Building Society*, 3 Q. B. R., p. 141.

10. Que le légataire particulier qui paye l'hypothèque grevant l'immeuble qui lui a été légué, est subrogé de plein droit aux droits du créancier qu'il a payé. —Q. B.—*Pennison & Pennison*, 9 Q. L. R., p. 122.

11. Que la subrogation légale est de droit étroit et ne peut pas être étendue par analogie, à des cas que la loi n'a pas prévus.—C. R.—*Venner vs Blanchet*, 8 Q. L. R., p. 288.

12. R. and D., Appellants, sold to B. an immoveable by them already hypothecated to Cunningham for $20,000, which B. undertook to pay. Subsequently, B. exchanged this for another property, Lot 1716, with Respondents, the Seminary of St Sulpice, who stipulated a *soulte et retour* of $10,235, but without prejudice to their hypothecary recourse by way of warranty on Lot 1716, given by them in exchange, to secure payment of $22,000. Later, B. sold Lot 1716 to R. S. & S. and in deed of sale the Respondent intervened, accepting R. S. & S., instead of B., for payment of their *soulte et retour* of $10,235, and for discharge of the hypothec of $20,000 payable to C. and affecting Lot 1716. C. sued Respondents in an hypothecary action, who paid, taking notarial discharge, claiming subrogation in C's, rights against R. and D., Appellants, under C. C. 1156, sec. 2 When sued, Appellants pleaded that by discharge in last deed of sale from B., Respondents had liberated him from his whole debt, including $20,000, payable to C., and by this discharge, Appellants were deprived of their recourse against him.—*Held :* — That Respondents never having been the personal creditors of B., could not and had not released him from his personal debt to Appellants, and that in this case there was subrogation.—Q. B.—*Reford & Ecclésiastiques du Séminaire de St Sulpice de Montreal*, 3 Q. B. R., p. 1.

13. Qu'un débiteur qui paie une dette à laquelle il est tenu conjointement et solidairement avec un autre, est de plein droit subrogé au créancier payé contre ce dernier débiteur. Que dans ce cas l'aveu du créancier payé ou de son procureur est suffisant, et est une preuve légale du paiement qui a opéré la subrogation.—C. R.—*Shorey vs Guilbault*, M. L. R., 3 S. C., p. 138.

1157. The subrogation declared in the preceding articles takes effect as well against sureties as against principal debtors. It cannot prejudice the rights of the creditor when he has been paid in part only ; in such case he may enforce his rights for whatever remains due, in preference to him from whom he has received payment in part.—Pothier, *Cout. d'Orl., Introd. au tit.* 20, nn. 83, 84, 87 ; Pothier, *Oblig.*, 280, 556 ; *Hypoth.*, ch. 2, sec. 3 ; Journal des Audiences, Arrêt du 6 juin 1712 ; Renusson, ch. 15, 16 et add ; C. N., 1252. [I. 99.]

DECISION:—Que mise en regard, la caution doit être préférée au tiers détenteur, et que la subrogation qu'obtient ce dernier en payant le créancier ne lui donne pas de recours contre la caution (C. C. 1941 et 1959).—CASAULT, J.—*Bilodeau vs Giroux*, 7 Q. L. R., p. 73.

Digitized by Google

§ 3. *Of the imputation of payments.*

1158. A debtor of several debts has the right of declaring, when he pays, what debt he means to discharge.—*ff* L. 1, *De solut. et liberat;* Cod., L. 1, *eod tit;* Pothier, 503, 528 or 539, 564; Domat, liv. 4, tit. 1, sec. 4, n. 1; C. L., 2159; C. N., 1253. [I 99.]

DECISIONS:—1. L'imputation faite dans une action non contestée, et sur laquelle est intervenu un jugement *ex parte*, doit être maintenue à l'encontre du débiteur qui aurait dû la contester alors, s'il y avait lieu.—LORANGER, J.—*Dufresne vs Hamilton*, 8 L. C. J., p. 197.

2. A person receiving money in payment of a certain debt, cannot retain therefrom, without the debtor's consent, the amount of a pre-existing debt.—CARON, J.—*Bryant vs Fitzgerald*, 4 Q. L. R., p. 6.

3. The defendant Kershaw, a broker, brought two cargoes of wheat for and on behalf of S., the second cargo being purchased from Kirkpatrick & Co., the plaintiffs. S. received separate invoices for the cargoes. The broker having sent his clerk to request payment, S. paid him $8,000, which was acknowledged by the clerk on the invoice of the second cargo. The defendant, subsequently, tried to get the payment imputed to the first cargo, but S. refused to alter the memorandum.—*Held:* That the debtor had a right to appropriate the payment, and a receipt having been given effectuating his intention, the appropriation could not be changed by the person receiving the money, and moreover, such alleged change should have been specially pleaded.—PRIVY COUNCIL.—*Kershaw & Kirkpatrick*, 22 L. C. J., p. 92, 3 App. Cas., p. 345.

1159. A debtor of a debt which bears interest or produces rent, cannot without the consent of the creditor impute any payment which he makes to the discharge of the capital, in preference to the arrears of interest or of rent. Any payment made on the capital and interest, but which is not entire, is imputed first upon the interest.—*ff* L. 5, 99, *De solut. et liberat;* Pothier, 533, 534 or 569, 570; Domat, liv. 4, tit. 1, s. 4, nn. 7, 8; C. L., 2160; C. N., 1254. [I. 99.]

DECISIONS:—1. Jugé que si les parties n'ont pas fait l'imputation des paiements, ils sont censés faits d'abord en déduction des intérêts.—K. B.—*Dumouchelle & Moffatt*, 2 R. de L., p. 258.

2. Judgment was rendered in this case, maintaining the principle that application should be made of payments on account of principal and not on account of interest till after the principal was paid.—C. R.—*Symard vs Lynch*, 3 R. L., p. 460.

3. If there be two hypothecary debts of different dates due by the same debtor to the same creditor, both payable by instalments, but with the privilege of acquitting the most ancient before it become due, and payments be made by the debtor to the creditor, without any application whatever, such payments will be imputed, firstly, in extinction of the interest due on the most ancient debt; secondly, on the principal of that debt whether due or not; thirdly, on the

Digitized by Google

interest of the most recent debt; and, lastly, on the principal of it.—C. R.—*Casson vs Thompson*, 1 L. C. J., p. 153.

4. Payment on account of a promissory note within five years, interrupts the statutory prescription, notwithstanding no action brought within that period.—Where there was a book account, and also a promissory note, and accounts stated had been rendered including both, and charging interest, the court will not strike off the interest, where the defendant had not pleaded an imputation of his payments as against the note.—SMITH, J.—*Torrance vs Philbin*, 4 L. C. J., p. 287.

5. Payments made without expressing imputation must be deducted preferably from the debt for which there is security and which bears interest.—Q. B.—*Brooks & Clegg*, 12 L. C. R., p. 461.

6. Partial payments will be imputed firstly upon the interest due and secondly upon the capital.—Q. B.—*Rice & Ahern*, 12 L. C. R., p. 280.

7. L'intimé ayant transporté à l'Appelant sans garantie une somme de $250 et intérêts, à prendre sur les premiers intérêts qui seraient dûs sur un prix de vente dû par Harland et sa femme.—*Jugé:* Que l'appelant ne peut réclamer aucune préférence en raison de l'article C. C. 1159, qui veut que les intérêts soient payés avant le capital, cet article ne s'appliquant qu'au cas où les deux parties de la créance appartiennent au même créancier, et non à des créanciers différents. —Q. B.—*Villeneuve & Graham*, 1 Q. B. R., p. 61.

8. When the credits for each year, in an account current, are in excess of the amount of interest charged for the year, it cannot be pretended that compound interest has been charged, inasmuch as payments made by a debtor on account, are imputed first on interest.—Q. B.—*Dudley & Darling*, M. L. R., 2 Q. B., p. 458.

1160. When a debtor of several debts has accepted a receipt by which the creditor has imputed what he has received in discharge specially of one of the debts, the debtor cannot afterwards require the imputation to be made upon a different debt, except upon grounds for which contracts may be avoided.—*ff Arg. ex lege* L. 1, 2, 3, *De solut. et liberat.*; Pothier, 566; C. L., 2161; C. N., 1255. [I. 99.]

1161. When the receipt makes no special imputation, the payment must be imputed in discharge of the debt actually payable which the debtor has at the time the greater interest in paying. If of several debts one alone be actually payable, the payment must be imputed in discharge of such debt although it be less burdensome than those which are not actually payable.

If the debts be of like nature and equally burdensome, the imputation is made upon the oldest.

All things being equal, it is made proportionally on each.—*ff* L. 1, 2, 3, 4, 5, 7, 8, 103, *De solut. et liberat.*; Pothier, 530, 531, 532; Domat, liv. 4, tit. 1, sec. 4, nn. 3, 4, 7; C. L., 2162; C. N., 1256. [I. 99 to 101.]

Digitized by Google

DECISIONS:—1. Where no application is made by the parties of payments the court will apply them to the most onerous debt.—BADGLEY, J.—*Walton vs Dodds*, 1 L. C. L. J., p. 66.

2. Parties holders of accommodation paper, even with knowledge of the fact, can recover thereon. The holders of such paper duly endorsed to them may rank upon the estate of and discharge the endorsers and even knowing the same to be still accommodation paper thereafter, recover thereon from the maker thereof. The imputation of payment made by the creditor, of monies paid by the endorser and not declared to be incorrect upon an account furnished, will operate as a valid imputation even against the accommodation maker.—MACKAY, J.—*Lyman vs Dion*, 13 L. C. J., p. 160.

3. Payments made by the debtor of two debts, both due, but one of which is secured by a collateral obligation, must be applied upon the debt secured, although at the time the payments were made the collateral obligation was not due.—Q. B.—*Doyle & Gaudette*, 20 L. C. J., p. 134.

4. C. made a promissory note for $97.20 in favour of T. who discounted it in a Bank. C., on the maturity of the note, sent T. $38.05 in cash and a renewal note for $68.15 which T. did not apply on the first note. The Bank charged the note for $97.20 to T.'s account when it became due. On the same day T. owed the Bank a balance of $11,937.19, including the note, which he covered by a deposit of $12,000.—*Held*:—That, where there was no reserve or stipulation to the contrary, such deposit must be imputed to the earliest debts of the depositor and that the note in question was paid by the deposit.—Q. B.—*Cleveland & Exchange Bank*, 31 L. C. J., p. 126, M. L. R., 3 Q. B., p. 30.

5. J., a customer of the Exchange Bank, respondent, discounted with that Bank appellant's acceptance. When it fell due appellant failed to pay it, and the bank charged it to J.'s account, who at the time owed the bank a small balance, which balance was augmented by subsequent transactions, wherein nevertheless if the credits were imputed to the earliest indebtedness, the balance due when the acceptance matured would be more than covered. The Bank retained possession of the acceptance and brought this suit against appellant, the acc p-tor, to recover its amount. Appellant pleaded payment and compensation. HELD:—That the Bank was entitled to recover from appellant the amount of his acceptance and that appellant was not discharged by the credits in the Bank's account with J.—Q. B.—*Goodall & Exchange Bank*, M. L. R., 3 Q. B., p. 430.

6. Where a Bank took a note endorsed by a customer as security for past advances amounting to about $10,000, and after the maturity of this note deposits amounting to more than $100,000 were passed to his credit in the books of the Bank, it was held that, in the absence of any special imputation of payments or reserve as to the application of the subsequent deposits, these deposits were to be imputed in payment of the oldest debt and the customer's liability at the maturity of the collateral security being more than paid by the subsequent deposits, the collateral security was discharged, and the bank's action against the maker and first endorser of said note would be dismissed.—DOHERTY, J.—*Exchange Bank vs Nowell*, M. L. R., 3 S. C., p. 129.

7. That a sum of $315 paid by certain sureties, for which the plaintiffs gave a receipt without making any special imputation of payment, should be imputed on account of certain costs in the Court of Queen's Bench, that being the debt which the Defendant had the greatest interest in paying.—TAIT, J.—*Macmaster vs Hannah*, M. L. R., 3 S. C., p. 459.

Digitized by Google

§ 4. *Of tender and deposit.*

1162. When a creditor refuses to receive payment, the debtor may make an actual tender of the money or other thing due; and in any action afterwards brought for its recovery he may plead and renew the tender, and if the thing due be a sum of money, may deposit the amount; and such tender, or such tender and deposit, if the thing due be a sum of money, are equivalent with respect to the debtor to a payment made on the date of the first tender; provided that from the date of the first tender the debtor continue always ready and willing to deliver the thing or to pay the sum of money.—Pothier, *Oblig.*, nn. 572, 573, 580; Pothier, *Constit. de rente*, n. 203; Pothier, *Dépôt*, 199; Domat, liv. 4, tit. 1, sec. 2, n. 8; Rousseau de Lacombe, vo. *Consignation* et vo. *Offres*; 1 Pigeau, *Proc. civ.*, pp. 430-486; C. N., 1257. [I. 101.]

Amendment:—8. Whenever any person desires to pay any sum of money, and is prevented from doing so by reason of the refusal of his creditor, or of the absence of his creditor from the place where the debt is payable, such person may deposit such sum with the treasurer, together with a proper designation of the nature of the debt, of the title under which it is due, and of the person or persons to whom he desires the money should be paid.

And the effect of this deposit shall be to liberate, for the future, whoever shall have made a tender, from the payment of interest on such sums of money, provided his creditor has, without having any right so to do, refused to accept such tender; and the moneys deposited for a creditor who is absent from the place where the debt is payable, shall also cease to bear interest against the debtor, if the amount deposited is sufficient.

9. The treasurer shall thereupon, on demand, pay to the creditor so designated the amount so deposited; saving the right of the depositor, if the deposit receipt has not been registered, and if the money has not been paid into court as a tender, to withdraw his deposit before the same shall have been demanded by his creditor.

10. Whenever any person desires to pay any sum of money which is demanded of him by contending claimants, he may deposit the money he so desires to pay with the treasurer of the province.

11. In the case mentioned in the preceding section, the treasurer shall pay over the amount deposited to the claimant, who shall produce and file an authentic copy of a competent judgment entitling

Digitized by Google

him to the money, saving the right of the depositor, if the deposit receipt has not been registered, and if the money has not been paid into court as a tender, to withdraw his deposit before the same shall have been demanded by the claimant.—Q. 35 Vict., cap. 5, ss. 8 to 11.

See also the Act intituled "An Act respecting the Treasury Department," the fifth section of which refers to deposit offices.—Q. 49-50 Vict., cap. 101, ss. 38 to 44.

DECISION:—Des offres sans consignation ne suspendent pas le cours de l'intérêt.—TASCHEREAU, J.—*Dumont vs Laforge*,, 1 Q. L. R., p. 159.

1163. It is necessary to the validity of a tender:

1. That it be made to a creditor legally capable of receiving payment or to some one having authority to receive for him;

2. That it be made on the part of a person legally capable of paying;

3. That it be of the whole sum of money or other thing payable, and of all arrears of rent and interest, and all liquidated costs, with a sum for costs not liquidated, saving the right to make up any deficiency in the same;

4. That, if it be of money, it be made in coin declared by law to be current and a legal tender;

5. That the term of payment have expired if stipulated in favor of the creditor;

6. That the condition under which the debt has been contracted have been fulfilled;

7. That the sum of money or other thing tendered be offered at the place where, according to the terms of the obligation or by law, payment should be made.—Pothier, 538 to 544 or 574 to 580; C. N., 1258. [I. 101.]

Amendments:—Paragraph 4 of this article in effected by the provisions of the Act intituled "An Act to provide for the issue of Provincial Notes," which notes were made legal tender. (This Act was recommended for appeal; see R. S. C., Vol. III, p. 2337.)—D. 29-30 Vict., cap. 10, s. 1.

The Act intituled "An Act respecting Dominion Notes" enacts that such notes shall be legal tender.—R. S. C., cap. 31, s. 4.

DECISIONS:—1. L'acte d'offres réelles doit spécifier l'énumération des diverses pièces de monnaie qui sont offertes. Le défaut d'énonciation du cours des espèces offertes entraîne la nullité des offres.—BERTHELOT, J.—*Perras vs Beaudin*, 6 L. C. J., p. 241.

2. It is not necessary for a person when offering a builder the balance due him under a contract to reserve his rights of action against the builder in respect

Digitized by Google

to defects in the building.—But if such reserve be made, the builder cannot on this account refuse to accept the balance tendered him.—BADGLEY, J.—*Filiatrault vs McNaughton*, 1 L. C. L. J., p. 63.

3. The holder of a promissory note is bound only to deliver such note to a *caution* on notarial tender by such *caution* of the amount due and is not bound to execute any formal subrogation. In an action against the makers and *caution*, the latter is bound to renew his tender and offer in court.—Q. B.—*Bove & McDonald*, 16 L. C. R., p. 191.

4. L'offre de la chose vendue doit être faite à une heure du dernier jour convenable pour que l'acheteur ait le temps de la peser et de l'examiner.—Q. B.—*Franchère & Gordon*, 2 R. L., p. 187.

5. Where a tender is refused simply on account of more being alleged to be due, it is not necessary that the amount tendered should be tendered in court.—VICE ADMIRALTY COURT.—*In re "British Lion,"* 2 S. V. A. C., p. 114.

6. That when a salary is payable in Bonds, to be taken at 50 per cent of their nominal value, a tender of three Bonds, equal to $1,500 par value, is not a legal tender of the sum of $619.50 or $1,239 in debentures, if the party tendering attaches the condition that the difference shall be returned to him in money.—Q. B.—*Legge & Laurentian Ry. Co.*, 24 L. C. J., p. 98.

7. That when a tender is refused, simply on account of more being alleged to be due than is tendered, it is not necessary that the amount offered should be in coin.—ALLEYN, J.—*Caird vs Webster*, 9 Q. L. R., p. 158.

1164. [If, by the terms of the obligation or by law, payment is to be made at the domicile of the debtor, a notification in writing by him to the creditor that he is ready to make payment has the same effect as an actual tender, provided that in any action afterwards brought the debtor make proof that he had the money or thing due ready for the payment at the time and place when and where the same was payable.]—[I. 101.]

DECISION:—Que lorsqu'il n'y a pas d'endroit fixé par l'obligation, la demande de paiement doit être faite par le créancier au domicile du débiteur (C. C. 1152) sans que ce dernier soit tenu d'avertir le créancier quand il sera prêt à payer.—Q. B.—*Beaudry & Barbeau*, 1 Q. B. R., p. 268.

1165. If a certain specific thing be deliverable on the spot where it is, the debtor must by his tender require the creditor to come and take it there.

If the thing be not so deliverable and be from its nature difficult of transportation, the debtor must indicate by his tender the place where it is and the day and hour when he is ready to deliver it at the place where payment ought to be made.

If the creditor fail in the former case to take the thing away, or in the latter to signify his willingness to accept, the debtor may, if he think fit, remove the thing to any other place for safe-keeping at

Digitized by Google

the risk of the creditor.—Rousseau de Lacombe, vo. *Offres;* Pothier, *Oblig.*, 577; 2 Kent's Com., pp. 506-509; 2 Story, *on Contracts*, n. 1005 a; 2 Greenleaf, *Evidence*, n. 610; 4 Marcadé, nn. 742, 743; C. N., 1264. [I. 101 to 103.]

1166. So long as the tender and deposit have not been accepted by the creditor, the debtor may withdraw them by leave of the court, in the manner provided in the Code of Civil Procedure, and if he do so his codebtors or sureties are not discharged.—Pothier, 580; C N., 1261. [I. 103.]

1167. When the tender and deposit have been declared valid by the court, the debtor cannot, even with the consent of the creditor, withdraw them to the prejudice of his codebtors or sureties or other third persons.—Pothier, *ibid*; C. N., 1262, 1263. [I. 103.]

1168. The mode in which tenders and deposits must be made is provided in the Code of Civil Procedure.—C. C. P. 538 et seq. [I. 103.]

SECTION III.—OF NOVATION.

1169. Novation is effected:

1. When the debtor contracts toward his creditor a new debt which is substituted for the ancient one, and the latter is extinguished;

2. When a new debtor is substituted for a former one who is discharged by the creditor;

3. When by the effect of a new contract, a new creditor is substituted for a former one toward whom the debtor is discharged.—*ff* L. 1, 2, 11, *De novation et delegation*; Cod., L. 1, 3, *eod. tit.*; Pothier, 582, 583, 584, 597, 605; Domat, liv. 4, tit. 3, sec. 1, n. 1, tit. 4, sec. 1, n. 1; 7 Toullier, n. 274; 3 Zachariæ, p. 448, note 15; 2 Delvincourt, p. 172 on art. 1271; C. N., 1271. [I. 103.]

DECISIONS:—1. A notarial act of obligation for money can be novated by an *acte sous seing privé*, and the mortgage thereby created can by the same means be destroyed.—K. B.—*Nadeau vs Robichaud*, 1 R. de L., p. 508.

2. Un billet promissoire, donné en paiement de loyer, n'opère pas novation.—K. B.—*Jones vs Lemesurier*, 2 R. de L., p. 317.

3. When there is no express mention of novation in a deed, the right of the creditor to sue upon the original claim, if he sees fit, remains.—C. R.—*Macfarlane vs Patton*, 1 L. C. R., p. 250.

4. An action on a promissory note, in which are included general counts for goods sold and delivered, will not be dismissed on a plea of prescription of five

Digitized by Google

years if, on the general counts, the original consideration be proved and in such case an unpaid promissory note is no payment.—*C. R.—Beaudoin & Dalmasse*, 7 L. C. R., p. 47.

5. To constitute a novation there must be some difference between the new and the old contract, and one promissory note will not operate as a novation of another promissory note previously given.—STUART, J.—*Brown vs Mailloux*, 9 L. C. R., p. 252.

6. A party cannot upon an action for goods sold and delivered plead the giving of a promissory note at a long date delivered to the creditor, without proving that it was accepted by the latter.—Q. B.—*Lavoie & Crevier*, 9 L. C. R., p. 418.

7. The acceptance of a note in renewal of one previously given is not a novation unless there be an express intention to effect such novation.—STUART, J.—*Noad vs Bouchard*, 10 L. C. R., p. 476.

8. Promissory notes signed by a debtor and payable to the creditor's order do not, if dishonoured at maturity, effect a novation of the debt for the payment of which they are given, if the intention to novate be not clearly expressed by the creditor at the time of their reception.—Q. B.—*Noad & Lampson*, 11 L. C. R., p. 29.

9. The acceptance of a promissary note by a creditor from his debtor does not effect a novation of his debt and he can always bring his action upon the original debt.—TASCHEREAU, J.—*Dasylva vs Dufour*, 16 L. C. R., p. 294.

10. The taking of a note made by B., for goods sold and delivered to A., does not operate a novation so as to discharge A. for the price of the goods, without an express agreement to make a novation.—SMITH, J.—*McGarvey vs Auger*, 7 L. C. J., p. 338.

11. An agreement in the following terms effects a novation of the original debt :—"We, the undersigned creditors, hereby agree to take 2s. 6d. in the £, "for our respective claims set forth in the annexed statement, and on payment "thereof within six weeks from date, we hereby undertake to grant him a dis- "charge in full."—BADGLEY, J.—*Tees vs McCulloch*, 2 L. C. L. J., p. 135.

12. A settlement of accounts, between the creditor and the principal debtor, and the taking by the creditor of a note payable on demand for the balance due by the debtor, does not operate a novation of the debt, so as to discharge a surety to the original obligation.—TORRANCE, J.—*Rogers vs Morris*, 13 L. C. J., p. 20.

13. A plea to an action on an account for goods sold and delivered, to the effect that the account was settled by note, which plea was supported by producing a paper charging the amount due, giving credit for $10.00 cash, and followed by the words "Réglé par un billet" and the signature of the Plaintiff, and concluding that the plaintiff's action be dismissed, is bad.—JOHNSON, J.—*Mercier vs Bousquet*, 5 R. L., p. 352.

14. An incorporation under the statute 13th and 14th Vict., ch. 28, commenced on the 22nd July, 1854 and completed on the 24th February, 1855, was legal. Promissory notes granted by a company so incorporated, during the period between July 1854 and February 1855, for goods sold and delivered by the Plaintiffs and renewed by notes of the company after the completion of the incorporation (the old notes being surrendered and given up to the company) were, together with the original debt for the goods, novated and paid. In the absence

Digitized by Google

of fraud, in effecting the exchange of notes as above, the shareholders who paid up their stock in full, and caused the fact to be duly registered, were free from all liability to pay said notes, or the original price of said goods.—Q. B.—*Brewster & Chapman*, 19 L. C. J., p. 301.

15. L'acceptation de billets promissoires par le créancier, n'opère pas novation de sa créance établie par jugement; mais il doit remettre les billets qu'il a acceptés avant de faire exécuter son jugement, et donner crédit au défendeur, en déduction de sa créance en capital, intérêts et frais, en vertu du dit jugement, au montant des billets payés et de ceux que, quoique non payés, le demandeur, pour quelque cause que ce soit, ne peut produire.—Q. B.—*Dawson & Desfossés*, 6 R. L., p. 334.

16. Le fait du propriétaire, d'avoir reçu plusieurs termes de loyer du sous-locataire, n'a pas l'effet d'opérer novation et de décharger le principal locataire. —Dorion, J.—*Boyer vs McIver*, 21 L. C. J., p. 160.

17. In an action on an obligation, the defendant pleaded that he had given the plaintiff, two promissory notes for £60 each, in deduction of the amount due, which he had paid them, and also, another note for £60, which was still in the plaintiff's hand. The plaintiff answered that the amount of the first notes had been received, and that the two last notes were given on an agreement, that the defendant should pay twelve per cent interest on the obligation.—*Held*, the amount of the second note must be deducted from the amount of the principal and interest, at six per cent, and the third note did not operate as a novation, and must be given back to defendant.—Berthelot, J.—*Beaudry vs Proulx*, 10 L. C. R., p. 236.

18. L'intervention d'un donateur, créancier d'une rente viagère affectant un immeuble, à un acte de vente du dit immeuble (acte par lequel il aurait accepté le paiement des intérêts du prix de vente, à la place des articles de sa vente) n'opère pas novation de sa créance.—Q. B.—*Bernier & Carrier*, 4 Q. L. R., p. 45.

19. That a deed of composition, being an act of liberality towards the debtor, its terms must be strictly complied with by him. So, where a debtor failed punctually to meet the instalments of his composition as they respectively became due, and the creditor sued for the full amount of the original debt, the action was maintained.—Torrance, J.—*Ross vs Bertrand*, 9 L. N., p. 314.

20. The old debt revives in full, if the composition be not paid.—Torrance, J.—*Rolland vs Seymour*, 2 L. N., p. 324.

21. Qu'un billet promissoire donné en reconnaissance d'un prêt d'argent et au moment même où le prêt est fait, n'opérant pas novation, on peut poursuivre sur le prêt après l'accomplissement de la prescription du billet.—Stuart, J.—*Robitaille vs Dénéchaud*, 5 Q. L. R., p. 238.

22. Where a *bon* or note has been given in acknowledment of a loan, which loan is not prescribed, although the *bon* is, the action may be brought on the loan, as the giving of the *bon* did not effect novation. The *bon*, however, being prescribed, cannot serve as proof of the claim, which must be established by other evidence.—Taschereau, J.—*McDonald vs Dillon*, 6 L. N., p. 291.—C. R.—6 L. N., p. 388.

23. Que des billets donnés en paiement du montant d'un jugement, n'opèrent pas novation, mais que le créancier doit déposer, avec son *fiat*, les billets non payés, avant de prendre une exécution.—Q. B.—*Dawson & Desfossés*, 10 R. L., p. 127.

Digitized by Google

24. Que le règlement du prix de marchandises par lettre de change ou billet promissoire, n'est pas un paiement, ni, sans circonstances extraordinaires, une novation de la dette.—CASAULT, J.—*Greenshields vs Dubeau*, 9 Q. L. R., p. 353.

25. A judgment creates a novation of the original debt, and, consequently, a judgment in a commercial matter for over $50, cannot be proved to have been paid by witness.—C. R.—*Dominion Type Co. vs Pacaud*, 10 Q. L. R., p. 354.

26. Novation does not take place where the second obligation is only to be the result of the non-fulfilment of the first, and its conversion, *à titre d'indemnité*, into the payment of a sum of money.—C. R.—*Forgues vs Brosseau*, M. L. R., 2 S. C., p. 376.

27. Where the lessee having become insolvent, the lessor agrees with his assignee to accept a new tenant, there is such a novation as to discharge a person who was surety *solidaire* with and for the original lessee.—C. R.—*Ménard vs Gravel*, 30 L. C. J., p. 275.

28. That the lessee's transfer to K. of his rights and obligations under the lease, although made with the assent and concurrence of the lessor, and although the lessor afterwards, for years, dealt with K. alone and transferred the rent to a third party as being due by K., did not effect a novation of the lessee's liability for rent.—MCCORD, J.—*Crédit Foncier Franco-Canadien vs Young*, 9 Q. L. R., p. 317.

29. Que si un créancier accepte de son débiteur, en règlement de sa créance, une lettre de change acceptée par un tiers et payable à vue, et, si, au lieu d'insister contre ce tiers pour le paiement immédiat de cette lettre de change, il accepte de lui un billet à échéance postérieure, il y a novation de cette créance, et que, dans ce cas, ce débiteur originaire est déchargé de l'obligation de payer cette créance, si le débiteur de la lettre de change vient à faillir avant le paiement.—Q. B.—*O'Brien & Semple*, 15 R. L., p. 164, M. L. R., 3 Q. B., p. 55, 31 L. C. J., p. 123.

30. See also case noted at C. C., 1961.—Q. B.—*Shaw & Lloyd*, 13 Q. L. R., p. 125.

See also cases noted at C. C. 1171.

1170. Novation can be effected only between persons capable of contracting.—*ff* L. 3, *De novat. et deleg;* L. 20, § 1, *eod. tit;* Pothier, 590, 591, 592; Domat, liv. 4, tit. 3, sec. 2, n. 1; C. N., 1272. [I. 103.]

1171. Novation is not presumed. The intention to effect it must be evident.—*ff* L. 2, *De novat. et deleg;* Domat, liv. 4, tit. 3, sec. 1, n. 1; Pothier, 594; C. N., 1273. [I. 103.]

DECISIONS:—1. Where there is no express mention of novation in a deed, the right of the creditor to sue upon the original claim, if he sees fit, remains.—C. R.—*Macfarlane vs Polton*, 1 L. C. R., p. 250.

2. The holder of a promissory note to order, under protest, who has received an account from the maker and another note at three months, retaining the first note as security for the second, does not lose his recourse against the endorsers of the first note, who have given their assent to the transaction, notwithstanding the insolvency of the maker of the first note.—Q. B.—*Woodbury & Garth*, 9 L., C. R., p. 438.

Digitized by Google

3. Que la délivrance par un débiteur à son créancier du billet promissoire d'un tiers en paiement d'une dette, n'opère pas novation à moins que l'intention du créancier qu'il y ait novation ne soit expressément et clairement exprimée.—CARON, J.—*Lagereux vs Joncas*, 13 Q. L. R., p. 268.

See also cases noted at C. C. 1169.

1172. Novation by the substitution of a new debtor may be effected without the concurrence of the former one.—Cod., L. 1, *De novat. et deleg; ff* L. 8, § 5, *De novation;* Pothier, 598; Domat, liv 4, tit. 3, sec. 1, n. 2; C. N., 1274. [I. 103.]

1173. The delegation by which a debtor gives to his creditor a new debtor who obliges himself toward the creditor does not effect novation, unless it is evident that the creditor, intends to discharge the debtor who makes the delegation.—*ff* L. 11, *De novation et delegation;* Pothier, 600, 603; Domat, *loc. cit;* C. N., 1275. [I. 105.]

DECISIONS:—1. The stipulation that a person shall pay a debt to a third party becomes a perfect delegation by the registration at length of the deed containing the same.—Q. B.—*Patenaude & Lérigé*, 7 L. C. R., p. 66.

2. Pour rendre une délégation parfaite, il suffit que la volonté du créancier d'accepter le nouveau débiteur au lieu et place de l'ancien, apparaisse de quelque manière, soit par quelque acte ou autrement. Des paiements antérieurs, faits par le délégué en son propre nom et à son propre acquit et ainsi acceptés et reçus par le créancier, constituent une acceptation suffisante de la délégation. Le débiteur en vertu d'une telle délégation ne peut en être libéré sans le consentement du créancier.—SMITH, J.—*Poirier vs Lacroix*, 6 L. C. J., p. 302.

3. A. intervened in a deed and agreed to pay a debt due to B., not a party to the document. B. brings his action for the amount against A., without previous acceptance of the delegation.—*Held*, that B. had no right of action.—Q. B.—*Proulx & Dorion*, 1 R. C., p. 476.

4. That a delegation of payment contained in a registered deed of sale of real property, unaccepted by the creditor, is no bar to an action by the creditor who has created such delegation against his debtor.—DORION, J.—*Mallette & Hudon*, 22 L. C. J., p. 101.

5. Where a *tiers-détenteur* of real estate has, by his deed of purchase of the same, made himself personally liable for the hypothecary claim created by his *auteurs*, the institution of the action by the hypothecary creditor against such *tiers-détenteur* is an acceptance of the delegation of payment made in the deed of purchase of said *tiers-détenteur* —RAINVILLE, J.—*Drummond vs Holland*, 23 L. C. J., p. 240.

6. Qu'une délégation du paiement, dans un acte de vente, n'ôte pas au vendeur le droit de recevoir le prix de sa propriété et d'en donner quittance à l'acquéreur, tant qu'elle n'est pas acceptée par le tiers en faveur de qui elle est faite, ou par une personne duement autorisée à le faire pour lui.—Q. B.—*Gérin-Lajoie & Desaulniers*, 2 Q. B. R., p. 241.—C. R.—7 Q. L. R., p. 272.

7. The acceptance by the hypothecary creditor of a delegation of payment, contained in the deed of sale of the hypothecated immoveable, is a matter of

Digitized by Google

consent merely between the creditor and purchaser, and may be proved by showing that both purchaser and creditor acknowledged and accepted the relation of debtor and creditor.—C. R.—*Trust & Loan Company vs Guertin*, 3 L. N., p. 382.

8. The mere acceptance of a delegation of payment does not create a novation of the original debt.—C. R.—*Ouimet vs Choquet*, 25 L. C. J., p. 223.

9. Qu'une simple indication de paiement ou la délégation d'un nouveau débiteur n'engendre aucun lien entre lui et le créancier délégataire tant que ce dernier n'a pas accepté le délégué.—Qu'il n'est pas nécessaire que l'acceptation soit expresse, si ce n'est à l'égard des tiers; mais que pour lier le délégué à la partie à qui la délégation est faite, l'acceptation peut s'inférer des circonstances. —Que l'enrégistrement par les parties à un acte contenant une délégation non acceptée, n'équivaut pas à une acceptation de la délégation.—Q. B.—*Société Permanente de Construction Jacques-Cartier & Robinson*, 1 Q. B. R., p. 32, 4 L. N., p. 39.

10. Que l'indication du paiement faite par deux vendeurs, dont un seul est le débiteur de l'indiqué, ne peut être révoquée que par les deux stipulants, et que la vente faite par l'acquéreur, avant l'acceptation par l'indiqué, à celui des deux qui était le débiteur de l'indiqué, n'opère ni révocation ni confusion.—Que l'acceptation de l'indication de paiement peut être tacite, c'est-à-dire, s'exprimer par des faits aussi bien que par des paroles. (C. C. 1029.)—C. R.—*Dostaler & Dupont*, 8 Q. L. R., p. 365.

11. That the lessee's transfer to K. of his rights and obligations under the lease, although made with the assent and concurrence of the lessor, and although the lessor afterwards, for years, dealt with K. alone, and transferred the rent to a third party as being due by K., did not effect a novation of the lessee's obligation to pay the rent.—McCord, J.—*Crédit Foncier Franco-Canadien vs Young*, 9 Q. L. R., p. 317.

12. Que les stipulations que le cessionnaire pourra retirer la dette transportée *comme garantie collatérale* et que celle-ci est cédée et abandonnée avec tous les droits, actions, privilèges et hypothèques du cédant, qui promet la fournir et faire valoir, opèrent une délégation complète de la dette en faveur du cessionnaire.—C. R.—*Leonard vs St. Armand*, 13 Q. L. R., p. 317.

13. Que si un créancier accepte de son débiteur, en règlement de sa créance, une lettre de change acceptée par un tiers et payable à vue, et, si, au lieu d'insister contre ce tiers pour le paiement immédiat de cette lettre de change, il accepte de lui un billet à échéance postérieure, il y a novation de cette créance, et que, dans ce cas, le débiteur originaire est déchargé de l'obligation de payer cette créance si le débiteur de la lettre vient à faillir avant le paiement.—Q. B.—*O'Brien & Semple*, 15 R. L., p. 164, M. L. R., 3 Q. B., p. 55, 31 L. C. J., p. 123.

See also cases noted at C. C. 1029 and 1174.

1174. The simple indication by the debtor of a person who is to pay in his place, or the simple indication by the creditor of a person who is to receive in his place, or the transfer of a debt with or without the acceptance of the debtor, does not effect novation.—*ff* L. 20, 21, 25, *De novat. et deleg.*; Pothier, *Oblig.*, 605; *Vente*, 551, 553; 7 Toullier, 274; 3 Zachariæ, p. 448, note 15; C. N., 1277. [I. 105.]

Digitized by Google

DECISIONS :—An action by the party indicated in a deed of sale as the person to whom the *prix de vente* of an immoveable shall be paid, will be dismissed upon plea of compensation by the Defendant as holder of notes previously made by the vendor, the *indication de paiement* not having been accepted by the plaintiff and the registration of the deed by the plaintiff does not affect the defendant's rights in such case.—BADGLEY, J.—*Seaver vs Nye*, 8 L. C. R., p. 221.

2. On ne peut maintenir une action sur une indication de paiement qui n'a pas été acceptée.—C. R.—*Lainé vs Toulouse*, 3 R. L., p. 445.

3. A *délégation imparfaite* in a deed of sale is not a personal undertaking on the part of the purchaser to pay the amount so delegated.—BADGLEY, J.—*Dubuc vs Charon*, 9 L. C. J., p. 79.

4. La stipulation faite dans un acte de vente par l'acquéreur qu'il paiera à l'acquit du vendeur avec la réserve de déguerpir et de délaisser la propriété acquise par lui au cas où il jugerait à propos ou à son avantage de le faire, ne le rend pas responsable personnellement au paiement de la dette, quoique cette indication ait été ensuite acceptée par le créancier et signifiée à l'acquéreur.—C. R.—*Société Permanente de Construction de Montréal vs Larose*, 17 L. C. J., p. 87.

5. The vendor of real property has a right to sue the purchaser for the price, notwithstanding that by the deed of sale the payment of such price was delegated in favor of a third party, so long as the delegation be not accepted.—DORION, J.—*Mallette vs Hudon*, 21 L. C. J., p. 199, 22 L. C. J., p. 101.

6. A clause in a deed of sale providing that the purchaser shall pay all hypothecary creditors, is not equivalent to an *indication de paiement*.—C. R.—*Roy vs Dion*, 4 Q. L., R., p. 245.

7. Que dans une action pour résiliation d'un acte de vente pour fraude, dans lequel le vendeur aurait chargé l'acquéreur de payer à un tiers une somme y mentionnée, sans qu'il apparaisse, par la déclaration, que l'indication de paiement de la somme ait été acceptée par le tiers, il n'est pas nécessaire de mettre en cause ce tiers indiqué.—MATHIEU, J.—*Ethier vs Paquette*, 12 R. L., p. 184.

1175. A creditor who has discharged his debtor by whom delegation has been made, has no remedy against such debtor, if the person delegated become insolvent, unless there is a special reserve of the remedy.—Cod., L. 3, *De novat. et delegat.*; *ff* L. 30, *eod. tit.*; Pothier, 604; Domat, liv. 4, tit. 4, sec. 1, n. 8; C. N., 1276. [I. 105.]

1176. The privileges and hypothecs which attach to an ancient debt do not pass to the one which is substituted for it, unless the creditor has expressly reserved them.—*ff* L. 18, *De novat. et deleg.*; L. 12, § 5, *Qui potior in pignore*; Pothier, 599; Domat, liv. 4, tit. 4, sec. 1, n. 8, tit. 3, s. 1, n. 6; C. N., 1278. [I. 105.]

1177. When novation is effected by the substitution of a new debtor, the original privileges and hypothecs cannot be transferred to the property of the new debtor; nor can they, without the con-

Digitized by Google

currence of the former debtor, be reserved upon the property of the latter.—*ff* L. 30, *eod. tit.*; Pothier 599; Domat, *loc. cit. suprà*; C. N., 1279. [I. 105.]

1178. When novation is effected between the creditor and one of joint and several debtors, the privileges and hypothecs which attach to the ancient debt can be reserved only upon the property of the codebtor who contracts the new debt.—Pothier, 599; C. N., 1280. [I. 105.]

1179. Joint and several debtors are discharged by novation effected between the creditor and one of the codebtors.

Novation effected with respect to the principal debtor discharges his sureties.

Nevertheless, if the creditor have stipulated in the first case, for the accession of the codebtors, and in the second, for that of the sureties, the ancient debt subsists if the codebtors or the sureties refuse to accede to the new contract.—Cod., L. 4, *De fidejussor et mandator*; Pothier, 599; C. N., 1281. [I. 105.]

DECISION:—A settlement of accounts between the creditor and the principal debtor, and the taking by the creditor of a note payable on demand for the balance due by the debtor, does not operate a novation of the debt, so as to discharge a surety to the original obligation.—TORRANCE, J.—*Rogers vs Morris*, 13 L. C. J., p. 20.

1180. The debtor consenting to be delegated cannot oppose to his new creditor the exceptions which he might have set up against the party delegating him although at the time of the delegation he were ignorant of such exceptions.

The foregoing rule does not apply if at the time of the delegation nothing be due to the new creditor, and is without prejudice to the recourse of the debtor delegated against the party delegating him.—*ff* L. 12, L. 19, *De novat. et delegat.*; Pothier, 602; 3 Maleville on art. 1281, p. 99. [I. 105 to 107.]

DECISION:—This article was considered and discussed by the Supreme Court in the case of—SUPREME COURT—*Windsor Hotel Co. & Cross*, 12 S. C. R., p. 625.

SECTION IV.—OF RELEASE.

1181. The release of an obligation may be made either expressly or tacitly by persons legally capable of alienating.

It is made tacitly when the creditor voluntarily surrenders to

Digitized by Google

his debtor the original title of the obligation, unless there is proof of a contrary intention.—*ff* L. 2, § 1, *De pactis*; Pothier, 572 or 608, 609, 619, 847; C. N., 1282. [I. 107.]

DECISIONS:—1. In a contract in the nature of a *remise* the consideration need not be expressed and with respect to such contracts the formalities required by law in relation to donations are not necessary *à peine de nullité*.—MEREDITH, J.—*Robertson vs Jones*, 8 L. C. R., p. 364.

2. La remise d'un billet promissoire au débiteur n'établit qu'une présomption de paiement, présomption qui peut être détruite par une preuve contraire. Lorsqu'il s'agit d'une affaire commerciale, cette preuve peut être faite par témoins.—Q. B.—*Grenier vs Pothier*, 3 Q. L. R., p. 377, 1 L. N. p. 33.

1182. The surrender of a thing given in pledge does not create a presumption of the release of the debt for which it was pledged.—*ff* L. 3, *De pactis;* Cod., L. 2, *De remissione pignoris;* Pothier, 610; C. N., 1286. [I. 107.]

1183. The surrender of the original title of an obligation to one of joint and several debtors is available in favor of his codebtors. —*ff Arg. ex lege* 2, *De duobus reis constituendis*; Pothier, 608, 616; C. N., 1284. [I. 107.]

1184. An express release granted in favor of one of joint and several debtors does not discharge the others; but the creditors must deduct from the debt the share of him whom he has released.—*ff* L. 16, *De acceptilat;* L. 34, § 11, *De solut. et liberat;* Pothier, 275, 556, 617, 621; C. N., 1285. [I. 107.]

1185. An express release granted to the principal debtor discharges his sureties.

If granted to the surety, it does not discharge the principal debtor.

If granted to one of several sureties it does not discharge the others, except in cases in which the latter would have a recourse upon the one released and to the extent of such recourse.—*ff* L. 60, 68, § 2, *De fidejussor et mandat.; ff* L. 23, *De pactis*; Pothier, 616, 617; 4 Marcadé, pp. 611, 612; C. N., 1287. [I. 107.]

DECISION:—Que dans le cas de décharge et composition entre un débiteur et ses créanciers, lorsque l'acte a lieu, non pas à la raison de l'intention des créanciers, de donner au débiteur le montant de ses créances, mais parcequ'ils ne peuvent pas avoir plus, la dette naturelle continuant à exister, la caution solidaire n'est pas déchargée.—C. R.—*Leclaire vs Forest*, M.-L. R., 1 S. C., p. 113.

Digitized by Google

1186. [That which the creditor receives from a surety as a consideration for releasing him from his suretyship is not imputed in discharge of the principal debtor, or of the other sureties, except as regards the latter, in cases in which they have a recourse upon the one released, and to the extent of such recourse.]—*ff* L. 15 § 1, De. fid. et mand.; Pothier, 617, 618 and Dumoulin cited by him; C. N., 1288. [I. 109.]

SECTION V.—OF COMPENSATION.

1187. When two persons are mutually debtor and creditor of each other, both debts are extinguished by compensation which takes place between them in the cases and manner hereinafter declared.—*ff* L. 1, 2, 3, *De compensatione;* Pothier, 623; Domat, liv. 4, tit. 2, sec. 1, nn. 1 et seq.; C. N., 1289. [I. 109.]

DECISIONS:—1 A partner has no right to dispose of partnership property for his private benefit; the agreement pleaded was illegal and null.—TASCHEREAU, J.—*Poston vs Watters*, 1 R. C., p. 245.

2. The defendant bought wood from one of the partners in a firm, in ignorance of the existence of the partnership. This partner owed him money, but the wood was the property of the partnership.—*Held*, that the defendant could not set off the amount of his purchase against the debt due him by the partner from whom he bought, although the latter managed the affairs of the partnership.—Q. B.—*Rolland & Saint-Denis*, 2 L. C. L. J. p. 110.

1188. Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality.

So soon as the debts exist simultaneously they are mutually extinguished in so far as their respective amounts correspond.—*ff* L. 10, 11, 12, 7, 22, *De compensationibus; ff* L. 7, *De solutionibus;* Cout. de Paris, art. 105; Domat, liv. 4, tit. 2, sec. 1, nn. 3, 4; *Ibid.*, liv. 4, tit. 2, sec. 2, nn. 2, 4; Pothier, 538, 624, 626, 627, 628, 635, 637, 638; C. N., 1290, 1291. [I. 109.]

DECISIONS:—1. Upon a note not payable to order, but assigned by a notarial *acte* at a time when a much larger sum than the amount of the note was due and owing by the payee to the maker, an action cannot be supported, for at the time of the assignment both claims were mutually compensated.—K. B.—*Gibsone vs Lee*, 1 R. de L., p. 347.

2. A debt due by an auctioneer to the purchaser at auction, who knows that the seller is an agent for another and not the principal, cannot be set off in the way of compensation against the price of the goods so bought.—K. B.—*Rex vs Melvin*, 2 R. de L., p. 76.

3. One judgment may be set-off against another by a compensation, and by

Digitized by Google

an opposition *afin d'annuler*, for payment, *pro tanto*.—K. B.—*Frosts vs Esson*, 3 R. de L., p. 475.

4. A debt need not be absolutely *claire et liquide* to be set up in compensation against a debt certain, provided it be easily proved; consequently, an account for goods sold and delivered may be opposed to a debt due under a notarial instrument.—Q. B.—*Hall & Beaudet*, 6 L. C. R., p. 75.

5. In an action upon a notarial obligation the defendant will not be allowed to set up unliquidated damages by way of set off or compensation.—C. R.—*Chapdelaine vs Morrison*, 6 L. C. R., p. 491.

6. In an action on a promissory note a plea setting forth that, at the time the note became due, the plaintiffs had in their possession goods belonging to the defendants of the value of the note and that the debt was therefore compensated, is bad, and that the value of goods or merchandise cannot be pleaded in compensation to a demand for a sum of money.—TASCHEREAU, J.—*Ryan vs Hunt*, 10 L. C. R., p. 474.

7. In an action brought by the heir of a deceased insolvent debtor to recover a debt contracted with his executors, a debt due by the deceased to the defendant may be pleaded in compensation.—STUART, J.—*Moss vs Brown*, 12 L. C. R., p. 202.

8. Compensation of a debt *claire et liquide* cannot be admitted against a *demande* for damages not yet established at the time of the fyling of the pleadings.—TASCHEREAU, J.—*Jordison vs McAdams*, 13 L. C. R., p. 229.

9. An account for board, where the debt is easily proved, is a debt *claire et liquide*, and such as may be offered in compensation to a debt under an obligation.—C. R.—*Desjardins vs Tassé*, 2 L. C. L. J., p. 88.

10. To an action on a note, Thomas, one of the endorsers, pleaded payment. It appeared that he had furnished the plaintiff with groceries, the accounts for which were stated in the pass book to have been "settled," but it did not appear that any money passed. The plaintiff having given unsatisfactory replies when examined as to his payments it was *held* that the price of the goods must be deducted from the note.—Q. B.—*Angers & Ermatinger*, 2 L. C. L. J., p. 158.

11. Par suite d'un jugement de séparation de corps et de biens, sur la contestation des droits et reprises matrimoniales de la femme, elle devra rembourser à son mari ou à ses créanciers le montant des dettes par lui acquittées sur un propre de sa femme, et compensation aura lieu d'autant quant à ses reprises matrimoniales.—MONK, J.—*Leduc vs Fortier*, 7 L. C. J., p. 275.

12. Compensation does not take place *pleno jure* of the debt due (unpaid stock) by the shareholder in the Montreal and Bytown Railway Company, incorporated by 14 and 15 Vict., cap. 51, to a judgment creditor of the company, with a debt due by the company to the shareholder for arrears of salary as president of the company where the first mentioned debt is for stock not paid up and where no calls have been made by the company on such unpaid stock.—PRIVY COUNCIL.—*Ryland & Delisle*, 14 L. C. J., p. 12, 3 P. C. App., p. 17.—Q. B.—12 L. C. J., p. 29.

13. The defendant in an action on a promissory note pleaded in compensation a debt alleged to be due by the plaintiff (but not evidenced by any proof in writing), being part of a sum of money borrowed from the plaintiff by a third party, the transfer of which debt to defendant had been signified on plaintiff after the institution of the action.—*Held:* that such debt was not equally *claire et liquide* under C. C. 1188 and could not be pleaded in compensation to an action on a note.—MACKAY, J.—*Parsons vs Graham*, 15 L. C. J., p. 41.

Digitized by Google

14. Damages given for illegal and unwarranted attachment, *saisie-arrêt*, may be compensated by debt due upon which *saisie-arrêt* issued.—C. R.—*Belleisle vs Lyman*, 15 L. C. J., p. 305.

15. Une dette due au défendeur par une société dont le demandeur faisait partie ne peut pas être offerte en compensation de la créance personnelle du demandeur.—Day, J.—*Batten vs Desbarats*, M. C. R., p. 5.

16. An auctioneer receiving the goods of an insolvent party, cannot offset the proceeds against a debt due to himself, but is liable to account to the creditors of the insolvent party.—Day, J.—*Fisher vs Draycott*. M. C. R., p. 54.

17. La compensation n'a lieu qu'entre des dettes également claires et liquides. Le défendeur rencontra une action sur un billet promissoire, en offrant en compensation une égale somme qu'il disait lui être due pour sa part de la récolte d'une terre dans laquelle les parties avaient un intérêt commun, et dont le demandeur refusait de lui rendre compte.—Jugé, que cette dette n'est pas également claire et liquide.—C. R.—*Perrault vs Herdman*, 3 R. L., p. 440.

18. Le commerçant qui reçoit une consignation d'effets a le droit d'appliquer le produit de la vente de ces effets en déduction d'un compte que celui qui a consigné lui devait.—Torrance, J.—*Stabb vs Lord*, 5 R. L., p. 181.

19. Il n'est pas nécessaire que les réclamations alléguées en compensation soient claires et liquides, mais il suffit qu'elles soient susceptibles d'une liquidation aisée.—Johnson, J.—*Ross vs Brunet*, 5 R. L., p. 229.

20. A party acquiring a claim under the circumstances and for the purpose mentioned in sec. 91 of the Insolvent Act of 1869, cannot oppose said claim in compensation.—The transfer of such debt is null and void as against the insolvent's estate.—In the present case the compensation could not be acquired under C. C. 1188 and 1196.—Beaudry, J.—*Riddell vs Reay*, 18 L. C. J., p. 130

21. Un débiteur poursuivi pour le montant de deux billets promissoires, et qui prouve que le demandeur lui est endetté en un plus fort montant, et plaide compensation, pourra faire débouter l'action du demandeur, même si ce dernier par ses répliques allègue une créance, autre que celle pour laquelle il a poursuivi, suffisante pour compenser la créance du défendeur, outre le montant de l'action, et prouve cette créance.—Q. B.—*Gilbert & Lionais*, 7 R. L., p. 339.

22. The right to compensate an amount paid in error or without legal cause arises the moment the payment is made, and not merely at the date of the action *en répétition* for such amount.—C. R.—*Brunelle vs Buckley*, 19 L. C. J., p. 98.

23. That a dividend payable under a dividend sheet, under the Insolvent Act of 1875, cannot be retained by the assignee of the estate, by way of set-off or compensation against a debt due to the assignee by the creditor collocated, as endorser of certain notes given in payment of a sale of the stock-in-trade of the insolvent by the assignee to another party.—Q. B.—*Walker & Doutre*, 23 L. C. J., p. 317.

24. A plea of compensation by damage, to an action for a liquidated claim under a charter party, is not demurrable.—Johnson, J.—*Bozzo vs Moffat*, 4 L. N., p. 61.

25. When a plea of compensation was set up in answer to an action on a cheque, and the claims on which compensation was asked were due before the cheque was given, it was held that the plea was bad.—Torrance, J.—*Dorion vs Dorion*, 5 L. N., p. 130.—Q. B.—3 Q. B. R., p. 389.

26. A claim of unliquidated damages *ex delicto* (damages caused by the

Digitized by Google

wrongful issue of a capias) cannot be pleaded in compensation to an action for goods sold.—BROOKS, J.—*Lucke vs Wood*, 6 L. N., p. 98.

27. An indebtedness arising out of alleged joint transactions between the defendant and a deceased person, cannot be pleaded in compensation to an action by the universal legatee of the latter for a *prix de vente*, but monies paid out by the defendant for the deceased, to the use of the defendant, and a bill for professional services rendered to deceased, can be so pleaded.—TORRANCE, J.—*Martin vs Dansereau*, 7 L. N., p. 109.

28. Slander may be pleaded in compensation to an action for damages for slander.—C. R.—*Coutu vs Lefebvre*, 7 L. N., p 111.

29. Compensation may be pleaded between a claim of the Crown for the price of land sold and a debt due by the Crown for salary.—MATHIEU, J.—*Hon. Sir A. Campbell vs Judah*, 7 L. N., p. 147.

30. A depositor, who is also a shareholder in a Bank in liquidation and insolvent, is not entitled to offer the amount of his deposit in compensation of calls made upon his stock by the liquidators, under the double liability clause. (34 Vict. cap 5, sec. 58.)—PAPINEAU, J.—*Exchange Bank of Canada vs Burland*, 8 L. N., p. 18.

31. Que la compensation doit être offerte et opérée de bonne foi, et qu'un créancier, porteur d'un billet, ne peut s'endetter chez le faiseur, en lui laissant ignorer qu'il est porteur de ce billet, pour ensuite l'offrir en compensation.—RAINVILLE, J.—*Daoust vs Geoffrion*, 12 R. L., p. 401.

32. Que le débiteur d'une société en nom collectif peut, après la dissolution de la société, opposer à une demande de la ci-devant société, en compensation, une créance qu'il a contre un des membres de la société, et ce pour la part de ce dernier.—Q. B.—*Gauthier & Lacroix*, 12 R. L., p. 508.

33. Qu'il y a lieu à la compensation contre une Banque insolvable, si les deux créances sont devenues échues avant l'ordre de mise en liquidation, quoiqu'après la suspension des paiements de la banque.—MATHIEU, J.—*Banque d'Echange du Canada vs St Amour*, 13 R. L., p. 443.

34. Qu'un actionnaire d'une banque qui achète des créances contre la banque, après la suspension de paiement, ne peut offrir ses créances en compensation du montant des versements que le syndic de la banque lui réclame, en vertu de la section 58 du 34 Vic., cap. 5.—Q. B.—*Gilman & Court*, 13 R. L., p. 619.

35. Que le créancier d'une Banque en faillite qui, après la date de la mise en liquidation, perçoit un montant de certains effets de commerce qu'elle avait mis en gage pour une créance déterminée, ne pourra opposer en compensation, après le paiement de la créance garantie par le gage, à la demande des liquidateurs de la banque, une créance antérieure pour laquelle les effets de commerce n'avaient pas été mis en gage.—MATHIEU, J.—*Banque d'Echange du Canada vs Banque d'Epargne de la Cité et du District*, 14 R. L., p. 8.

36. Que dans un acte de vente où il est énoncé que le vendeur, ès-qualité de syndic à une faillite, a reçu de l'acheteur le prix de la vente, il ne peut ensuite, si cette énonciation a été faite faussement, être prétendu que le dit vendeur ès-qualité, étant endetté personnellement envers le mandant de l'acheteur, il y avait eu compensation pour autant.—Que, dans ce cas, l'acheteur est redevable envers la faillite de tout le prix de vente, et il ne peut invoquer que le paiement réel des sommes d'argent qui ont été, à l'acquit de tel prix de vente, donnés au vendeur, en sa dite qualité de syndic.—Q. B.—*Savoie & Rainville*, 14 R. L., p. 364.

Digitized by Google

37. The defendant was entitled to plead, to an action on a promissory note, that the plaintiff was under an obligation to deliver to him a note for a larger amount in payment of goods sold and delivered, but had made default, and to ask that the note sued on be declared compensated by so much of what was due by plaintiff.—C. R.—*Quintal vs Aubin*, M. L. R., 1 S. C., pp. 140 & 397, 8 L. N., p. 60.

38. Qu'une créance résultant de dommages ni claires ni liquides, ne peut être offerte, par exception péremptoire, en compensation à une action d'un vendeur réclamant la valeur d'un prix de vente d'un immeuble par acte authentique, alors même que ces dommages résultent de la violation par le vendeur des conditions du dit acte de vente.—MATHIEU, J.—*Gagnon vs Gaudry*, M. L. R., 1 S. C., p. 348.

39. That a claim for damages cannot be set up in compensation of an action in revendication. That the defendants may set up, by way of incidental cross demand, to an action in revendication, a claim for damages, if both claims, in revendication and for damages, arise out of the same contract.—TASCHEREAU, J.—*Lockie vs Mullin*, M. L. R., 2 S. C., p. 262.

40. Where drafts and notes are placed with a Bank by a debtor of the Bank, not as collateral security, but for collection, compensation does not take place until the Bank has received the amounts collected by them on such notes, and in the present case, the debtor having become insolvent before any amounts were received on such notes, compensation did not take place between the amount collected by the Bank and the debt due to it.—Q. B.—*Exchange Bank of Canada & Canadian Bank of Commerce*, M. L. R., 2 Q. B., p. 476, 10 L. N., p. 110. —TORRANCE, J.—M. L. R., 1 S. C., p. 225.

41. Que l'on ne peut opposer en compensation à une créance résultant d'un acte de donation entrevifs pur et simple, une autre créance provenant du fait que dans une communauté de biens qui aurait existé entre les parties et qui aurait été dissoute après inventaire, le demandeur serait resté en possession des biens de la communauté, aurait même vendu à son profit des biens lui appartenant, de manière qu'il se trouve débiteur envers le défendeur.—MATHIEU, J.—*Foucault vs Foucault*, M. L. R., 2 S. C., p. 255.

42. Qu'une personne dont les biens sont saisis-arrêtés avant jugement par un créancier, sans cause raisonnable et probable, peut, dans la même action, réclamer des dommages par demande incidente, et opposer à l'action un plaidoyer de compensation basé sur les dommages par lui réclamés par sa demande incidente. —MATHIEU, J.—*Furniss vs Bleault*, M. L. R., 2 S. C., p. 419.

43. Qu'un défendeur poursuivi pour le montant des billets promissoires, ne peut opposer en compensation des dommages non liquidés, résultant des procédures par saisie-arrêt avant jugement, faites par le demandeur.—MATHIEU, J.—*Banque d'Ontario vs Foster*, 13 R. L., p. 48.

44. Qu'un assuré ne peut opposer, en compensation de sa prime d'assurance, les dommages qu'il allègue avoir éprouvés par un incendie, attendu que la créance de tel assuré n'est ni claire ni liquide, et que le paiement de la prime d'assurance est une condition préalable de la part de l'assuré, à l'exercice d'aucun droit et au recouvrement des pertes couvertes par la police d'assurance.—LORANGER, J.—*Giles vs Giroux*, 13 R. L., p. 652.

45. An amount due to a defendant's attorney cannot be offered in compensation of a claim against the client and evidence of such alleged contra-account is inadmissible.—TAIT, J.—*Fulton vs Darling*, M. L. R., 3 S. C., p. 475.

Digitized by Google

46. There can be compensation of a debt due to an abandoned estate at the time of the abandonment, by an unprivileged claim for wages then unearned.—ANDREWS, J.—*Chinic & Lefaivre*, 14 Q. L. R., p. 167.

47. Qu'il n'y a pas de compensation en matière d'injure, vu que les deux réclamations ne sont pas claires et liquides, mais que le défendeur, poursuivi en dommage, pour injures, peut opposer à la demande une provocation par des injures que lui aurait adressées le demandeur.—MATHIEU, J.—*Martineau vs Roy*, 16 R. L., p. 257.

48. The Defendant had leased a house to the Plaintiff but refused to give him possession thereof. The Plaintiff had in a previous suit obtained judgment against the Defendant, declaring the lease existent and operative and awarding costs in the Plaintiff's favour against the Defendant. By the present action he sought to obtain possession of the leased house. The Defendant pleaded that the Plaintiff had not paid or tendered the rent to which the latter answered that it was compensated by the judgment in his favour against the former for costs, which answer was maintained by the Court.—C. R.—*Morgan vs Dubois*, 32 L. C. J., p. 204.

1189. Compensation is not prevented by a term granted by indulgence for the payment of one of the debts.—*ff* L. 16, § 1, *De compensationibus*; Pothier, 232, 627; Cout. de Paris, art. 105; 1 Comment. Ferrière (petit), p. 227; Arrêtés de Lamoignon, tit. 28, art. 5; C. N., 1292. [I. 109.]

DECISION:—Qu'en matière commerciale, lorsque l'acheteur néglige de donner au vendeur un billet promissoire, tel qu'il aurait été convenu, ce dernier peut alors et avant l'expiration du terme, poursuivre l'acheteur pour le montant de la vente. Qu'il peut aussi, dans le cas précédent, offrir le montant de la vente en compensation à l'encontre d'un billet promissoire dont l'acheteur réclame le paiement contre lui. (C. C. 1538.)—C. R.—*Quintal vs Aubin*, M. L. R., 1 S. C., pp. 140 & 397.

1190. Compensation takes place whatever be the cause or consideration of the debts or of either of them, except in the following cases:

1. The demand in restitution of a thing of which the owner has been unjustly deprived;

2. The demand in restitution of a deposit;

3. A debt which has for object an alimentary provision not liable to seizure.—Cod., L. 3, L. 14, *De compensat*; *ff* L. 24, L. 25, § 1, L. 26, § 1, *Depositi*; Cod., L. 11, *Depositi*; *ff* L. 4, *De agnoscendis et alendis liberis, etc.*; Arrêtés de Lamoignon, tit. 28, art. 7; Pothier, 625; Domat, liv. 1, tit. 7, sec. 3, n. 14, liv. 4, tit. 2, sec. 2, n. 6; C. N., 1293. [I. 109.]

DECISIONS:—1. *Aliments* whether by disposition of the law or of man are favored, and *insaisissables* by law, and therefore a testamentary allowance by a

Digitized by Google

father to his children, until the time fixed by his will for the final partition of his estate, is valid.—The testamentary condition attached to the alimentary allowance in a will against seizure, mortgage or anticipation by the alimentary beneficiaries and against its subjection, seizure, or other contingencies to which personal or other property is subject, frees it from compensation as respects debts due to the testator or his estate by alimentary debtor.—PRIVY COUNCIL.—*Muir vs Muir*, 18 L. C. J., p. 96, 5 R. L, p. 67, 5 P. C. App., p. 66.

2. Les chemins de fer auxquels s'applique la seconde partie de "l'Acte des Chemins de Fer de Québec, 1869." et spécialement ceux dont la construction est subventionnée par la couronne, forment partie du domaine public, et ne peuvent pas plus être vendus par autorité de justice que par les corporations créées pour les construire et les exploiter.—CASAULT, J.—*Wason Manufacturing Co. vs Le Chemin de Fer de Lévis et Kennébec*, 5 Q. L. R., p. 99.

3. Que les argents entre les mains du gouvernement et dûs aux contracteurs ne sont pas saisissables.—MEREDITH, C. J.—*Gingras vs Vézina*, 5 Q. L. R., p. 237.

4. On peut saisir une partie des loyers donnés ou légués comme insaisissables, si le donataire a fait, avec ses épargnes, des améliorations aux maisons ou des constructions nouvelles.—RAINVILLE, J.—*Catelli vs Gareau*, 4 Thémis, p. 57.

5. Where property was bequeathed with the condition that it should be unseizable, and was substituted to the children of the heirs, and the executors sold a portion to one of the heirs, it was held that the effect was to make a partition, and the revenues of said property were unseizable.—PRIVY COUNCIL.—*Molson & Carter*, 10 App. Cas., p. 664.—Q. B.,—6 L. N., p. 372.

6. Que les dommages-intérêts pour torts personnels, peuvent être compensés par une dette due par l'offensé à celui qui les doit.—CASAULT, J.—*Williams & Rousseau*, 12 Q. L. R., p. 116.

7. Que l'usufruit et jouissance des meubles meublants et des choses qui, sans se consumer de suite, se détériorent peu à peu par l'usage, détenus à titre d'usufruit, ne peuvent être saisis et vendus par les créanciers de l'usufruitier.—STUART, J.—*Bertrand vs Pepin dit Lachance*, 6 Q. L. R., p. 352.

8. Que les droits d'usage et d'habitation stipulés aliénables avec le consentement du nu-propriétaire, sont saisissables, et que la saisie n'en peut être opposée que par ce dernier.—C. R.—*Goulet vs Gagnon*, 8 Q. L. R., p. 208.

9. Qu'une somme accordée comme réparation civile d'une injure personnelle est, de sa nature, insaisissable.—PAPINEAU, J.—*Maurier vs Desrosiers*, 12 R. L., p. 655, 7 L. N., pp. 264 & 361.

10. Qu'en principe, la créance d'aliment *ex officio pietatis* ne peut être l'objet d'une compensation ni d'une saisie.—JETTÉ, J.—*Millot vs Millot*, 30 L. C. J., p. 328.

11. That a sum of money awarded by a Court as indemnity for personal injuries of a permanent nature, partakes of the character of an alimentary allowance, and is unseizable.—PAPINEAU, J.—*Beauvais vs Leroux*, M. L. R., 2 S. C., p. 491.

12. That a railway cannot be seized and sold in part, even on a judgment by bond holders, except in accordance with the disposition of the special statute authorising the creation of the hypothec. A railway is an indivisible thing and can only be sold as a whole.—Q. B.—*Stephen & Banque d'Hochelaga*, M. L. R. 2 Q. B., p. 491.

13. Que les dommages accordés comme réparation civile dans une action

Digitized by Google

d'injure parceque le défendeur aurait souffleté la fille mineure du demandeur sont insaisissables.—ROUTHIER, J.—*Laberge & Bouchard*, 10 L. N., p. 331.

14. L. obtained a judgment against A. and seized $500 in the hands of T., which had been awarded A. by the Court of Queen's Bench as damages for libel. A. contested the attachment on the ground that the said sum being awarded him as damages for injury to his reputation and feelings, was exempt from seizure, but it was held that it was not so exempt.—Q. B.—*Lalonde & Archambault*, 31 L. C. J., p 195, M. L. R., 3 Q. B., p. 486, 11 L. N.,p. 131.—TORRANCE, J.,—M. L. R., 2 S. C., p. 410.

15. An alimentary allowance may properly be seized in satisfaction of a judgment for an alimentary debt.—TAIT, J.—*Downie vs Francis*, M. L. R., 3 S. C., p. 371.

16. To an action of damages brought by the plaintiff personally as well as being had of the community, alleging that the defendant had slandered plaintiff's wife, the defendant pleaded in compensation that the plaintiff's wife had slandered defendant, without specifying the occasion or alleging that the plaintiff was present and had approved of the words uttered.—*Held:* That the plaintiff, not being responsible for slander committed by his wife without his knowledge or approval, such slander could not be pleaded in compensation.—LORANGER, J.—*Lavallée vs Surprenant*, 10 L. N., p. 313.

17. Que les portraits de famille sont insaisissables.—CIMON, J.—*Blais vs Julien*, 10 L. N., p. 331.

18. That a railway may be seized and sold for the debts of the company which owns such railway.—PRIVY COUNCIL.—*Redfield & Corporation of Wickham*, 11 L. N., p. 113, 13 App. Cas., p. 467.

19. Que l'indemnité que peut exiger la caution d'un débiteur en faillite ne lui permet pas d'opposer la dette qu'elle a cautionnée en compensation ou extinction de sa dette au failli.—C. R.—*Sirois vs Beaulieu*, 13 Q. L. R., p. 293.

1191. The surety may avail himself of the compensation which takes place when the creditor owes the principal debtor.

But the principal debtor cannot set up in compensation what his creditor owes to the surety.

A joint and several debtor cannot set up in compensation what the creditor owes to his codebtor, except for the share of the latter in the joint and several debt.—*ff* L. 4, 5, *De compens;* L. 23, *eod. tit;* *ff* L. 10, *De duobus reis constituendis;* Cod., L. 9, L. 18, § 1, *De compensat;* Arrêtés de Lamoignon, tit. 27, art. 9; Domat, liv. 3, tit. 3, sec. 1, art. 8; Pothier, 274, 631; 7 Toullier, 377; C. N., 1294. [I. 109 to 111.]

1192. A debtor who accepts purely and simply an assignment made by the creditor to a third person, cannot afterwards set up against the assignee the compensation which he might before the acceptance have set up against the assignor.

Digitized by Google

An assignment not accepted by the debtor, but of which due notification has been given to him, prevents compensation only of the debts due by the assignor posterior to such notification.—*Arrêt du Parl. de Paris*, 13 *août* 1591; Pothier, *Oblig.*, 632, *Vente*, 558; C. N., 1295. [I. 111.]

1193. When the two debts are payable at different places, compensation cannot be set up without allowing for the expenses of remittance.—*ff* L. 15, *De compensat*; Pothier, 633; Domat, lit. 4, tit. 2, sec. 2, n. 8; C. N., 1296. [I. 111.]

1194. When compensation by the sole operation of law is prevented by any of the causes declared in this section, or by others of a like nature, the party in whose favor alone the cause of objection exists, may demand the compensation by exception; and in such case the compensation takes place from the time of pleading the exception only.—Pothier, 626, 636; 7 Toullier, 396; 4 Marcadé, p. 640. [I. 111.]

1195. When there are several debts subject to compensation due by the same person, the compensation is governed by the rules provided for the imputation of payments.—*ff* L. 1, L. 5, § 1, L. 102, § 1, L. 3, 94, § *fin*; *ff* L. 4, 7, 97, 103, *eod. tit*; Pothier, 638; C. N., 1297. [I. 111.]

1196. Compensation does not take place to the prejudice of rights acquired by third parties.—7 Toullier, 381, 394; 12 Duranton, 442, 443; C. N. 1298. [I. 111.]

DECISIONS:—1. A party acquiring a claim under the circumstances and for the purpose mentioned in sec. 91 of the Insolvent Act of 1869, cannot oppose said claim in compensation. The transfer of such debt is null and void as against the insolvent's estate. In the present case the compensation could not be acquired under C. C. 1188, 1196.—BEAUDRY, J.—*Riddell vs Reay*, 18 L. C. J., p. 130.

2 A quantity of timber was pledged for the payment of a draft, and it was agreed that if the draft were not paid, the holder was to sell the wood and place the proceeds to the owner's credit. The draft was not paid, the owner of the wood became insolvent and the pledgee sold the wood, of which he had never had actual delivery. *Held*:—That the pledgee could not place the balance of the price of sale, after paying the draft, to the credit of a former indebtedness of the owner.—Q. B.—*Perkins & Ross*, 6 Q. L. R., p. 65.

1197. He who pays a debt which is of right extinguished by compensation cannot afterwards in enforcing the debt which he has

Digitized by Google

failed to set up in compensation avail himself, to the prejudice of third parties, of the privileges and hypothecs attached to such debt, unless there were just grounds for his ignorance of its existence at the time of payment.—*ff* L. 10, § 1, *De compensationibus*; Cod., L. 1. *De condict. indeb.*; Pothier, 639, 640; C. N., 1299. [I. 111.]

SECTION VI.—OF CONFUSION.

1198. When the qualities of creditor and debtor are united in the same person, there arises a confusion which extinguishes the obligation; nevertheless in certain cases when confusion ceases to exist, its effects cease also.—*ff* L. 50, *De fidejussor et mandator*; *ff* L. 95, § 2, *De solut. et liberat*; Cod., L. 6, *De hæreditariis actionibus*; Pothier, 639, 640; C. N., 1300. [I. 113, III. 381.]

DECISIONS:—1. La clause du testament du mari, par lequel il institua son épouse sa légataire universelle en usufruit, à la charge "de payer et acquitter les "dettes du testateur," n'a pas eu l'effet dans l'espèce actuelle, d'opérer aucune confusion en la personne de son épouse survivante quant à ses reprises matrimoniales, par son acceptation de ce legs.—MONK, J.—*Gauthier vs Morochond*, 7 L. C. J., p. 320.

2. Un donateur appelé par la loi à la succession de son fils, ne peut, sans renoncer à la succession, repousser les obligations qu'entraîne sa qualité d'héritier, et réclamer de la veuve du défunt en sa qualité d'usufruitière de ses biens une dette à lui due par son fils sur ses propres, et il y a, en ce cas, confusion des qualités de créancier et de débiteur. Il ne peut pas même réclamer de la veuve usufruitière les intérêts des capitaux qui lui étaient dus par son fils.—LORANGER, J.—*Desautels vs Larue*, 1 R. L., p. 485.

3. The legacy *en usufruit* by a man to his wife does not make the latter lose her recourse against her husband or his heirs for *reprises matrimoniales* and that confusion does not exist in such case.—Q. B.—*Ménéclier & Gauthier*, 16 L. C. R., p. 181.

1199. The confusion which takes place by the concurrence of the qualities of creditor and principal debtor in the same person, avails the sureties.

That which takes place by the concurrence of the qualities of surety and creditor or of surety and principal debtor does not extinguish the principal obligation.—*ff* L. 38, § 1, *De fidejussor et mandator*; *ff* L. 34, § 8, *De solution*; *ff* L. 129, § 1, *De reg. jur*; Pothier, 340, 644, 645; C. N., 1301. [I. 113.]

SECTION VII.—OF THE PERFORMANCE OF THE OBLIGATION BECOMING IMPOSSIBLE.

1200. When the certain specific thing which is the object of an

Digitized by Google

obligation perishes, or the delivery of it becomes from any other cause impossible, without any act or fault of the debtor, and before he is in default, the obligation is extinguished; it is also extinguished although the debtor be in default, if the thing would equally have perished in the possession of the creditor; unless in either of the above mentioned cases the debtor has expressly bound himself for fortuitous events.

The debtor must prove the fortuitous event which he alleges.

The destruction of a thing stolen or the impossibility of delivering it does not discharge him who stole the thing, or him who knowingly received it, from the obligation to pay its value.—*ff* L. 33, 37, 51, L. 82, § 1, L. 136, *De verb. oblig.*; *ff* L. 47, § 6, *De legatis*; *ff* L. 15, § 3, *De rei vindicatione*; *ff* L. 7, § 2, L. 12, *De condict. furtivâ*; Pothier, 649, 650, 656, 657, 660 et seq. to 668; Ibid., *Vente*, 56, 57, 58; C. N., 1302. [I. 113.]

DECISIONS :—1. Le vol d'une montre mise en gage par le demandeur chez le défendeur, q' i a été lui même victime d'un vol plus considérable, sans qu'il y ait eu de sa part ni faute ni négligence, constitue un cas fortuit dont le défendeur ne peut être tenu responsable.—RAINVILLE, J.—*Soulier vs Lazarus*, 21 L. C. J. p. 104.

2. A pawnbroker is not liable for articles pledged with him which have been stolen from his premises without any negligence on his part.—JOHNSON, J.—*Delany vs Lazarus*, 21 L. C. J., p. 131.

3. An employee of the Grand Trunk Railway left a sum of $22,000 in an open bag in his room while he went to lunch. He had a desk with locked drawers and a strong metal box in the room appropriated for his use. There was also a safe vault in the building. The money disappeared while he was at lunch. *Held* :—That it was for the defendants to prove that the money had been stolen, and even if such proof had been made, there was fault and negligence on the employee's part, in failing to lock up the money, sufficient to bring the loss within the terms of the guarantee bond cited below, and his employers were entitled to recover.—RAINVILLE, J.—*Grand Trunk vs Citizens Ins. Co.*, 1 L. N., p. 485.—Q. B. —3 L. N., p. 311.

4. The obligation of the vendor of an indeterminate thing who has undertaken to deliver it at a future time and at a certain place, *e. g.*, "to deliver a cer- "tain quantity of glass, to be imported from Germany, the then next spring, in the "port of Montreal," is not extinguished by the loss of the thing *in transitu*, even by *vis major*. The vendor in such case is liable in damages to the purchaser, viz., for the profit which the purchaser would have made, deducting the ordinary risk, of re-sale.—TESSIER, J.—*Thomson vs Geling*, 1 Q. L. R., p. 67.

5. Un secrétaire-trésorier des Commissaires des Ecoles ayant reçu un chèque provenant de l'argent des écoles, le remit au président des Commissaires, pour en retirer le montant. Celui-ci, ayant obtenu l'argent pour le chèque, fut volé de la plus grande partie de la somme qu'il avait reçue. JUGÉ :—Que dans l'espèce, la perte de la somme volée n'est pas due à la négligence, ni à la faute du secrétaire-trésorier, et qu'il n'en est pas responsable.—Q. B.—*Ouimet & Verville*, 1 Q. B. R., p. 66, 7 Q. L. R., p. 34.

Digitized by Google

6. Que le vendeur d'un immeuble, qui s'est réservé la jouissance de cet immeuble, pendant un certain temps, n'est pas responsable de l'incendie des bâtisses érigées sur l'immeuble vendu, si l'acheteur qui poursuit et réclame du vendeur la valeur des bâtisses incendiées, n'allègue et ne prouve pas que l'incendie eut lieu par la faute du vendeur, qui, pendant le temps de cette occupation, ne peut être considéré comme un locataire et n'est pas soumis aux dispositions de l'article 1629 du Code Civil.—Q. B.—*Weir & Winter*, 15 R. L., p. 191.

7. When the appellant was obliged to return certain bonds to the respondent, but could not do so, owing to his having disposed of them, it was held that he was bound to pay the respondent their actual value at the time the bonds were acquired by him, and not their par or nominal value.—Q. B.—*Senécal & Hatton*, M. L. R., 1 Q. B., p. 112, 7 L. N., p. 414.—Confirmed in Privy Council, 10 L. N., p. 50. (Not reported in App. Cas.))

1201. When the performance of an obligation has become impossible, without any act or fault of the debtor, he is bound to assign to the creditor such rights of indemnity as he may possess relating to the obligation.—Pothier, 669, 670, *Vente*, 56, 57, 59 ; C. N., 1303. [I. 113.]

1202. When the performance of an obligation to do has become impossible without any act or fault of the debtor and before he is in default, the obligation is extinguished and both parties are liberated ; but if the obligation be beneficially performed in part, the creditor is bound to the extent of the benefit actually received by him.—4 Marcadé, p. 650 on art. 1302 ; 7 Toullier, 642. [I. 113.]

DECISION:—Que le fait du prince ne peut être considéré comme force majeure, libérant le débiteur de son obligation, que lorsque l'exécution de cette obligation est devenue impossible absolument, mais non lorsqu'elle n'est devenue que plus onéreuse ou plus difficile. Que même dans le cas d'impossibilité absolue d'exécution, le débiteur doit encore être condamné s'il a sollicité ou participé au fait d'où résulte l'impossibilité. Que l'impossibilité d'exécution transforme de plein droit l'obligation en dette de dommages et intérêts, que le créancier peut réclamer sans donner l'alternative de l'obligation originaire.—JETTÉ, J.—*Gregory vs Canada Improvement Co.*, 5 Thémis, p. 10.

For English decisions as to the impossibility of performing obligations, see 3 L. N., p. 368.

Digitized by Google

CHAPTER NINTH.

OF PROOF.

SECTION I.—GENERAL PROVISIONS.

1203. The party who claims the performance of an obligation must prove it.

On the other hand he who alleges facts in avoidance or extinction of the obligation must prove them ; subject nevertheless to the special rules declared in this chapter.—Cod., L. 1, L. 4, *De probationibus ; ff* L. 19, 21, 22, 23, *De probationibus ; ff* L. 1, *De exception*, 44, 1 : Pothier, *Oblig.*, n. 729 ; Ibid., *Constitut. de rente*, n. 155 ; 1 Domat, liv. 3, tit. 6, sec. 1, nn. 4, 5 ; C. N., 1315. [I. 115]

1204. The proof produced must be the best of which the case in its nature is susceptible.

Secondary or inferior proof cannot be received unless it is first shown that the best or primary proof cannot be produced.—Greenleaf, *Evid.*, nn. 82, 84, and generally cap. 4, Book 2. [I. 115.]

DECISIONS :—1. The verbal testimony of the secretary of a railway company, chartered under the provisions of " The Railway Clauses Consolidation Act," to the effect that it appeared by the books of the Company that the shares originally in the name of the defendant had been transfered before the institution of plaintiff's action, who sues as a creditor of the Company to recover the amount unpaid on such shares, is insufficient to establish the fact of such transfer.—BADGLEY, J.—*Cockburn vs Beaudry*, 2 L. C. J., p. 283.

2. Parol testimony of age will not be admitted until the non-existence of baptismal registers has been proved.—MONK & BERTHELOT, JJ.—*Hartigan vs Intern. Life Ass. Society*, 8 L. C. J., p. 203.

3. The evidence of the vendor of a thing revendicated, tending to establish his right of property and, in consequence the legality of the sale, should always be received with caution.—MAGISTRATES COURT.—*Leblanc vs Rasconi*, 4 R. L., p. 595.

4. Que le consentement d'une partie, que la preuve testimoniale, faite par un témoin, de faits qui devraient être constatés par écrit, permet à l'autre partie d'invoquer cette preuve contre elle, sans que la partie qui a fait l'admission puisse elle-même l'invoquer.—C. R.—*Cie. de la Pêche aux Marsouins de la Rivière Ouelle vs Gagnon*, 16 R. L., p. 269.

See also cases noted at C. C. 1231.

Digitized by Google

1205. Proof may be made by writings, by testimony, by presumptions, by the confession of the party or by his oath, according to the rules declared in this chapter and in the manner provided in the Code of Civil Procedure. C. N., 1316. [I. 115.]

1206. The rules declared in this chapter, unless expressly or by their nature limited, apply in commercial as well as in other matters.

When no provision is found in this code for the proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England.—C. S. L. C., c. 82, sect. 17, p. 698. [I. 115.]

SECTION II.—OF PROOF BY WRITINGS.

§ *1. Of authentic writings.*

★ **1207.** The following writings executed or attested with the requisite formalities by a public officer having authority to execute or attest the same in the place where he acts, are authentic and make proof of their contents without any evidence of the signature or seal appended to them, or of the official character of such officer being necessary, that is to say :

Copies of the acts of the imperial parliament and of the parliament of this province, and copies of the Edicts and Ordinances, and of the ordinances of the Province of Quebec, and of the statutes and ordinances of the Province of Lower Canada, and of the statutes of Upper Canada, printed by the printer duly authorized by Her Majesty the Queen, or by any of her predecessors ;—C. S. C., c. 80 ; c. 5, sec. 6, n. 27, sec. 14, nn. 1, 2. [I. 115.]

Letters-patent, commissions, proclamations and other instruments issued by Her Majesty the Queen, or by the executive government of the province ;—Pothier, *Oblig.*, 730, 731 ; Rép. Guyot, vo *Authentique*, nn. 34, 35, 36 ; 8 Toullier. nn. 34-5-6 ; 1 Greenleaf, *Evid.*, nn. 470, 479, 480 ; 1 Taylor, *Evid.*, § 1368. [I. 115.]

Official announcements in the Canada Gazette published by authority ;—1 Greenleaf, *Evid.*, n. 492. [I. 117.]

The records, registers, journals and public documents of the several departments of the executive government and of the parliament of this province ;—1 Greenleaf, *Evid.*, 480-3 ; 22 Vict., c. 80, sec. 5. [I. 117.]

Digitized by Google

The records and registers of courts of justice and of judicial proceedings in Lower Canada ;—C. S. C., c. 80, sec. 5. [I. 117.]

All books and registers of a public character required by law to be kept by official persons in Lower Canada ;—*Ibid.* [I. 117.]

The books, registers, by-laws, records and other documents and papers of municipal corporations and of other corporations of a public character in this province ;—Municipal Act. 1860, C. S. L. C., c. 24 sect. 20, nn. 3, 4; C. S. C., c. 80, sec. 5, 6 ; 1 Greenleaf, *Evid.*, 484. [I. 117.]

Official copies and extracts of and from the books and writings above mentioned, certificates, and all other writings executed or attested in Lower Canada, which are included within the legal intendment of this article although not enumerated.—C. S. C., c. 80, sect. 5. [I. 117.]

Amendments :—1. The following writings executed or attested, with the requisite formalities, by a public officer having authority to execute or attest the same, in the place where he acts, are authentic, and make proof of their contents, without any evidence of the signature or seal appended to them, or of the official character of such officer, being necessary, that is to say :

(1.) Letters-patent, commissions, proclamations, orders in council, and other instruments issued by the executive government of this province ;

(2.) The records, registers, journals and public documents of the several departments of the executive government, and of the legislature of this province ;

(3.) Official copies and extracts of and from the books, documents and writings above mentioned, certificates and all other writings included within the legal intendment of this section, although not enumerated.

2. The signature of the deputy clerk of the executive council, named by the lieutenant governor in council, or of the first clerk of the office of the executive council, shall have the same effect under this act, as the signature of the clerk of the executive council would have had.—Q. 32 Vict., cap. 10.

See the act intituled "An act to amend the law respecting Documentary Evidence in certain cases."—D. 44 Vict., cap. 22, ss. 1 to 3.

A copy of any entry in any book of account kept in any department of the government of Canada shall, in all courts established by the Parliament of Canada and in all legal proceedings, civil and criminal, over which the Parliament of Canada has legislative authority, be received as *prima facie* evidence of such entry and of the

Digitized by Google

matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department that such book was at the time of the making of the entry, one of the ordinary books kept in such department, that the entry was made in the usual and ordinary course of business of such department and that such copy is a true copy thereof.—D. 48-49 Vict., cap. 48.

DECISIONS:—1. La copie certifiée par un régistrateur d'un acte authentique enregistré au long, ne fait pas preuve.—K. B.—*St-Pierre vs Ross*, 2 R. de L., p. 58.

2. A copy taken from the enregistered copy of a donation, is not evidence, —K. B.—*Beaudet vs Beaudet*, 2 R. de L., p. 279.

3. The *Gazette of Quebec* is authentic evidence of the publication of proceedings in the courts of the province, such as orders to call in creditors, sales by sheriff, etc.—K. B.—*Huppé vs Dionne*, 2 R. de L., p. 333.

4. A copy delivered by a registrar of a deed of sale of real estate deposited in his office is no evidence of such sale in a hypothecary action against the purchaser.—Q. B.—*Nye & Colvile*, 3 L. C. R., p. 97.

5. The return of a bailiff is an authentic act the validity of which can only be impugned by an inscription *en faux*.—Q. B.—*Trust & Loan Co. of Upper Canada & Mackay*, 9 L. C. R., p. 465.

6. Le rôle d'évaluation est un document authentique qui fait preuve complète de la valeur réelle et annuelle des biens immeubles d'une municipalité. pour les fins électorales.—MAGISTRATES COURT.—*Gratton vs Village de Ste. Scholastique*, 7 R. L., p. 356.

7. A certificate of burial which does not purport to be an extract from a register of burials kept by a minister or other person authorised by law to keep such register is irregular.—Q. B.—*Ricker & Simon*, 22 L. C. J., p. 270.

✱ **1208.** [A notarial instrument received before one notary is authentic if signed by all the parties.

If the parties or any of them be unable to sign, it is necessary to the authenticity of the instrument that it be received by one notary, in the actual presence of another subscribing notary, or of a subscribing witness.

The witnesses must be males not less than twenty-one years of age, of sound mind, not related to either of the parties within the degree of cousin-german, without interest in the instrument, not civilly dead, and not deemed infamous by law. Aliens may act as such witnesses.]

This article is subject to the provisions contained in the next following article, and to those relating to wills. It does not apply to the cases mentioned in article 2380, where a notary alone is sufficient. —Pothier, *Oblig.*, 732; 2 Jousse, *Adm. de la justice*, pp. 385 et seq.; Ord. 1498, 1507, 1543; Ord de Blois, art. 166; Drion, *Du notaire en second*, ch. 1, p. 48, ch. 3, pp. 75 et seq. [I. 117, III. 381.]

Digitized by Google

Amendments:—All minutes of notarial acts, except wills and codicils, which, at the time of the coming into force of the civil code, were not, or which since then have not been countersigned, shall, from and after the passing of this act, be held to be as valid and authentic as if they had been countersigned by a second notary, and the witnesses to the execution of the instrument therein named; provided always, that the validity or authenticity of the said acts is not affected by any other cause than that mentioned in this section.

All copies of such acts which have been delivered, and all registrations thereof which have been or may be made, shall be valid, and shall make proof of the said acts and of their registration, although the name of a second notary or of the witnesses to the execution of said acts, may be mentioned on such copies, whether they have been registered or not.—Q. 33 Vict., cap. 23, ss. 1, 2.

Notwithstanding the provisions of article 1208 of the Civil Code, the presence and signature of a second notary or of a witness, when the parties to a deed are unable to sign, shall not be requisite to complete and make authentic a deed passed before any notary, save in the case of wills.—Q. 46 Vict. cap. 32, s. 48.

(A similar proviso was enacted by the Act Q. 39 Vict., c. 33, s. 53, which was repealed by the above cited Act.)

DECISIONS:—1. Actes passés par les notaires du Bas-Canada, s'intitulant notaires du Canada, frappés de nullité.—Q. B.—*Beaudry vs Smart*, 1 R. de L., p. 45.

2. A copy of a paper, signed before one notary only, cannot be received in evidence as an *acte authentique*.—K. B.—*Mivile vs Roy*, 2 R. de L., p. 278.

3. The ordonnance of 1731 is no part of the law of Canada; if there be but two witnesses therefore to a notarial *acte* who do not write, this does not vitiate it, if it be executed in a country parish, for the 166th art. of the *ordonnance de Blois* requires written signatures by witnesses only "*ès gros bourgs et villes*," and they are not even there required "*à peine de nullité*."—K. B.—*Ruel vs Dumas*, 2 R. de L., p. 333.

4. In an action on a contract in authentic form before a Notary Public, the amount was in figures only. It was held by ROLLAND J. that the *acte* was for that cause without authenticity. The remainder of the court deciding the case on other issues, did not pass on this point.—Q. B.—*Macfarlane & Aimbault*, 4 L. C. R., p. 88.

5. In Lower Canada a law may be abrogated by disuse and the provisions of the Ordonnance of 1489 and of the Ordonnance de Blois (1579) in so far as they require the presence of a second notary to the execution of a notarial *acte* have been so abrogated. Consequently, a notarial *acte* is neither *faux* nor *nul* from the *minute* having been countersigned several years after it was executed, the *minute* having been signed by the parties, the whole without fraud, and the *minute* having been presented to the second notary by the *notaire instrumentaire* himself.—Q. B.—*Desforges vs Dufaux*, 13 L. C. R., p. 179.

Digitized by Google

6. A law does not become abrogated by desuetude from inobservance of its provisions for a long period of time.—Loranger, J.—*Lord vs Lauria*, 15 L. C. R., p. 452.

7. A deed of donation should be maintained even if, at the time of its being passed, the notary before whom it was received was, through weak sight, unable to write except for the purpose of signing his name.—Loranger, J.—*Raiche vs Alie*, 1 R. L., p. 77.

8. A notary can pass an act for his relations, especially if the act he passes be contrary to their interest; but cases of this description depend altogether on their merits. Whether they induce a presumption of fraud or otherwise, is the question.—K. B.—*Fournier vs Kirouac*, I R. de L., p. 508.

9. Les notaires peuvent instrumenter pour leurs parents lorsqu'il n'existe aucune fraude; les dispositions du Code Civil sur cette matière, ne décrètent point la peine de nullité.—C. R.—*Lynch vs McArdle*, 16 L. C. J., p. 108.

10. L'acte reçu par un notaire parent à l'une des parties, est valable en loi, à moins d'une preuve de fraude ; le Code Civil ne défend pas aux notaires de recevoir des actes dans lesquels leurs parents sont parties.—C. R.—*Lynch vs McArdle*, 3 R. L., p. 372.

11. La parenté du notaire en second à l'une des parties contractantes, n'entraîne pas la nullité de l'acte sous l'empire de notre Code Civil.—Stoorte, J.—*Guévremont vs Cardin*, 16 L. C. J., p. 257.

12. Lorsqu'un acte passé par un notaire, a été rédigé et lu par ce dernier, dans une langue étrangère à une des parties contractantes, et que ne comprenait pas cette partie contractante, il y a lieu pour cette dernière de faire preuve par témoins que l'acte en question ne renferme pas la convention des parties, et dans ce cas, il n'est pas nécessaire de recourir à l'inscription de faux pour faire annuler l'acte.—C. R.—*Noble vs Lahaye*, 1 R. L., p. 197.

13. Les clercs et serviteurs du notaire qui reçoit un acte authentique, consenti par des parties qui ne savent pas signer leur nom, peuvent servir de témoins à tel acte ; la prohibition d'appeler comme témoins à un acte les clercs et serviteurs du notaire instrumentaire, ne s'applique qu'aux testaments, conformément à l'article 844 du Code Civil, et ne peut être étendue aux actes authentiques ordinaires, en vertu de la dernière partie de l'article 1208.—C. R.—*Crébassa vs Crépeau*, 1 R. L., p. 667.

14. Qu'il n'est pas nécessaire pour qu'un acte de vente soit authentique, qu'il soit écrit et rédigé en présence des parties contractantes ; il suffit que lecture leur en soit faite lors de la perfection de l'acte, et qu'il y soit fait mention de cette lecture ; que dans un acte de vente, la fausseté de l'énonciation qu'une partie notable du prix de vente (£500.0.0, v. g.) a été payée par l'acheteur au vendeur, lors de la passation de l'acte, est un *faux* suffisant pour faire déclarer cet acte nul en entier ; qu'un acte de vente passé en langue anglaise entre les parties dont l'une ignore entièrement cette langue, mais traduit oralement par le notaire instrumentant, ne peut être déclaré faux et nul, la lecture du dit acte ayant été, dans ce cas, faite suivant la loi ; que la traduction orale de cet acte par le notaire instrumentant, sans qu'il en soit fait une copie écrite et annexée à la minute et comme en faisant partie, est équivalente à la lecture prescrite par la loi et peut la remplacer.—C. R.—*McAvoy vs Huot*, 1 Q. L. R., p. 97.

15 The testimony of the notaries, before whom a deed has been executed, to the effect that essential formalities, which on the face of the deed appear to

Digitized by Google

have been accomplished, were not so, if alone and uncorroborated, is insufficient to establish that the deed is *faux*.—Q. B.—*Larochelle & Proulx*, 1 Q. L. R., p. 142.

16. In the case submitted the *moyens* relied upon on an *inscription en faux* against a will, were not sufficiently established to procure the setting aside of the will and of the copy produced.—LORANGER, J.—*Bousquet vs Rinois*, 14 L. C. R., p. 381.

17. For the validity of a will executed by two notaries, the will must have been declared *dicté et nommé*, by the testator to the notary receiving the same, and a will prepared by a notary upon instructions previously given by the testator, subsequently acknowledged before both notaries, will be declared null and void.—TASCHEREAU, J.—*Evanturel vs Evanturel*, 15 L. C. R., p. 321, 16 L. C. R., p. 353.

18. But held in the Court of Queen's Bench that, the testatrix having caused her will to be prepared by a notary public, in pursuance of verbal instructions given by herself, and having afterwards repeated the whole of the contents of the will in the presence of the notary public who had prepared it and of the second notary called to witness the execution of the will and having in all other respects observed the formalities prescribed by art. 289 of the Custom of Paris, the will was legally *dicté et nommé* as required by the Custom and was a good and valid will and, according to the Custom of Paris, it is not necessary that a will by public act, (*testament solennel*,) be actually written in the presence of the testatrix and of the two notaries receiving the will.—Q. B.—*Evanturel & Evanturel*, 15 L. C. R., p. 321.

19. A will was not validly executed when a great portion thereof was prepared and drawn up by the notary out of the presence of the testator and of the second notary called to assist in receiving it and which was not read over twice nor read and repeated to the testator, in the presence of the second notary as required by law. The allegation in the will in question as to its having been declared and dictated word by word by the testator and read over and repeated, was untrue, and was rightly adjuged so to be an *inscription en faux*.—Q. B.—*Bourassa & Bourassa*, 17 L. C. R., p. 299.

✱**1209.** Notifications, protests and services may be made by one notary, at the request of a party whether such party has or has not accompanied him or signed the act.

Such instruments are authentic and make proof of their contents until contradicted or disavowed.

But nothing inserted in any such instrument as the answer of the party upon whom the same is served is proof against him, unless it is signed by such party.—C. S. L. C., c. 73, s. 27. [I. 117.]

Amendment:—Article 1209 of the Civil Code is repealed and replaced by the following:—

"**1209.** Notifications, summonses, protests and services by which a reply is required may be made by one notary, whether the party in whose name they are made has or has not signed the deed.

Digitized by Google

Such instruments are authentic and make proof of their contents until contradicted or disavowed. But nothing inserted in any such instrument as the answer of the person upon whom the same is served, is proof against him, unless it be signed by such party."

2. With the exception of the notifications, summonses, protests and services which precede, all other notifications, summonses, protests and services may be made by an ordinary notarial deed signed in the office of the notary or elsewhere; in such case, it is sufficient for the notary to serve a copy of such deed upon the person to be so notified, summoned or protested at his domicile.

It is not necessary to deliver to the adverse party a copy of the *procès-verbal* of service; such *procès-verbal* may be drawn up and signed afterwards.—Q. 47 Vict., cap. 14, s. 1.

1210. An authentic writing makes complete proof between the parties to it and their heirs and legal representatives:

1. Of the obligation expressed in it;

2. Of what is expressed in it by way of recital, if the recital have a direct reference to the obligation or to the object of the parties in executing the instrument. If the recital be foreign to such obligation and to the object of the parties in executing the instrument, it can serve only as a commencement of proof.—Pothier, *Oblig.*, 735, 736, 737; Dumoulin, *Cout de Paris*, 558, § 8, *glose* 1, n. 10; C. N., 1319, 1320. [I. 117 to 119.]

1211. An authentic writing may be contradicted and set aside as false in whole or in part, upon an improbation in the manner provided in the Code of Civil Procedure and in no other manner.—C. C., P. 159 et seq. [I. 119.]

DECISIONS:—1. The Plaintiff sold certain property to the Defendant and almost a year afterwards, he sued to rectify the deed of sale alleging that, by error, no clause had been inserted in the deed making a reservation of a mill site, which, he stated, he had not intended to sell. The declaration was demurred to and the demurrer sustained.—C. R.—*Sabine vs Krans*, 3 L. N., p. 267.

2. Que la Cour ne peut permettre à une partie à un acte authentique, de prouver par témoins la fausseté de la date de l'acte sans avoir recours à l'inscription en faux, que dans un seul cas, savoir, lorsqu'il s'agit d'un rapport d'huissier. (C. C. P., 159.)—PAPINEAU, J.—*Lewis vs Primeau*, 7 L. N., p. 39.

See also certain of the cases noted at C. C., 1208 and 1234.

1212. Counter-letters have effect between the parties to them only; they do not make proof against third persons.—*ff* L. 27, § 5,

Digitized by Google

De pactis; Cod., L. 2, *Plus alere quod agitur;* Domat, liv. 3, tit. 6, sec. 2, nn. 14, 15; 8 Toullier, 182 et seq.; 2 Chardon, *Dol*, n. 51; C. N., 1321. [I. 119.]

DECISION:—Where the sale is made by husband and wife, a *contre lettre*, passed after the sale between the purchaser and the husband only, which does not contain anything injurious to the interests of the wife, is not illegal.—MONK, J.—*Lemoine vs Lionais*, 2 L. C. L. J., p. 163.

The Privy Council, to which this case was carried, did not pass its *dictum* in this point.—PRIVY COUNCIL.—6 R. L., p. 123.

1213. Acts of recognition do not make proof of the primordial title, unless the substance of the latter is specially set forth in the recognition.

Whatever the recognition contains over and above the primordial title, or different from it, does not make proof against it.—Novelle 119, cap. 3; Pothier, *Oblig.*, 777, 779; Pothier, *Rente*, 147, 148, 149, 153; C. N., 1337. [I. 119.]

1214. The act of ratification or confirmation of an obligation which is voidable does not make proof unless it expresses the substance of the obligation, the cause of its being voidable and the intention to cover the nullity.—C. N., 1338. [I. 119.]

§ 2. *Of copies of authentic writings.*

1215. Copies of notarial instruments, certified to be true copies of the original, by the notary or other public officer, who has the legal custody of such original, are authentic and make proof of what is contained in the original.—Pothier, *Oblig.*, 765 et seq.; C. S. L. C., ch. 73, sec. 31, n. 8; C. N., 1334. [I. 119.]

DECISION:—1. A copy of a notarial act duly certified is evidence in Canada, under the law of England, in cases in which the rule of that law obtains in evidence.—K. B.—*Moses vs Henderson*, 2 R. de L., p. 278.

2. A copy of a notarial deed, not certified to by the notary, is a nullity, and an action based on such exhibit will be dismissed.—Q. B.—*Ricker & Simon*, 22 L. C. J., p. 270.

3. Que la production d'une copie d'un acte authentique, constatant que S. Labelle a signé cet acte, ne fera pas preuve de la signature du défendeur, Sévère Labelle, sans que l'identité soit établie.—RAINVILLE, J.—*Côté vs Labelle*, 12 R. L. p. 33.

1216. Extracts duly certified and delivered by notaries or by the prothonotaries of the Superior Court from the originals of au-

Digitized by Google

thentic instruments lawfully in their custody are authentic and make proof of their contents; provided such extracts contain the date, place of execution and nature of the instrument, the names and description of the parties to it, the name of the notary before whom it was received, the clauses or parts of clauses extracted at full length, and that mention be made of the day on which the extract is delivered and be noted on the originals.—C. S. L. C., c. 73, sec. 28; C. N. 1336. [I. 119.]

1217. When the original of any notarial instrument has been lost by unforeseen accident, a copy of an authentic copy thereof makes proof of the contents of the original, provided that such copy be attested by the notary or other public officer with whom the authentic copy has been deposited by judicial authority for the purpose of granting copies thereof, as provided in the Code of Civil Procedure.—Pothier, *Oblig.*, 766-775; Imbert, *Pratique judiciaire*, liv. 1, ch. 47, n. 4, p. 321; C. C. P. 1252 et seq.; C. N., 1335. [I. 119.]

DECISIONS:—1. The contents of a lost document can be proved by verbal testimony after the loss has been established by affidavit, which is the regular way of proving such loss.—BADGLEY, J.—*Russell vs Guertin*, 10 L. C. J., p. 133.

2. A witness shall not be interrogated about a copy of a statement until the non-production of the original is accounted for.—TORRANCE, J.—*Glen Brick Company vs Shackell*, 14 L. C. J., p. 238.

3. When the *minute* of a notarial *acte* is lost, a certified copy thereof can be used to prove its contents.—Q. B.—*Lamontagne & Contant*, 6 R. L., p. 607.

1218. Copies of notarial instruments and of extracts therefrom, of all authentic documents, whether judicial or not, of papers of record, and of all documents and instruments in writing, even those under private signature, or executed before witnesses, lawfully registered at full length, when such copies bear the certificate of the registrar, are authentic evidence of such documents, if the originals have been destroyed by fire or other accident, or otherwise lost.—Pothier, *Oblig.*, 772-3; Boiceau, part. 1, ch 11; C. N., 1336. [I. 121, III 381.]

1219. If in such cases the original document be in the possession of an adverse party, or of a third party, without collusion on the part of the person who relies upon it, and it cannot be produced, the copy certified as in the preceding article makes proof in like manner. —C. S. L. C., c. 37, s. 20; Poth. *Oblig.* 772-773. [I. 121, III. 381.]

Digitized by Google

§ 3. *Of certain writings executed out of Lower Canada.*

1220. The certificate of the secretary of any foreign state or of the executive government thereof, and the original documents and copies of documents hereinafter enumerated, executed out of Lower Canada, make *primâ facie* proof of the contents thereof without any evidence being necessary of the seal or signature affixed to such original or copy, or of the authority of the officer granting the same, namely :—C. S. L. C., c. 90, s. 4. [I. 121.]

1. Exemplifications of any judgment or other judicial proceeding of any court out of Lower Canada, under the seal of such court, or under the signature of the officer having the legal custody of the record of such judgment or other judicial proceeding ;—Ibid. s. 5. [121.]

2. Exemplifications of any will executed out of Lower Canada, under the seal of the court wherein the original will is of record, or under the signature of the judge or other officer having the legal custody of such will, and the probate of such will under the seal of the court ;—Ibid. s. 6. [I. 121.]

3. Copies of the exemplification of such will and of the probate thereof certified by the prothonotary of any court in Lower Canada, in whose office the exemplification and probate have been recorded, at the instance of an interested party and by the order of a judge of such court ; such probate is also received as proof of the death of the testator :—Ibid, s. 5. [I. 121.]

4. Certificates of marriage, baptism or birth, and burial of persons out of Lower Canada, under the hand of the clergyman or public officer who officiated, and extracts from any register of such marriage, baptism or birth, and burial, certified by the clergyman or public officer having the legal custody thereof ;—Ibid. s. 3. [I. 121.]

5. Notarial copies of any power of attorney executed out of Lower Canada, in the presence of one or more witnesses and authenticated before the mayor of the place or other public officer of the country where it bears date, the original whereof is deposited with the notary public in Lower Canada granting the copy ;—Ibid. s. 8. [I. 121.]

6. The copy taken by a prothonotary or a clerk of a circuit court in Lower Canada of any power of attorney executed out of Lower Canada in the presence of one or more witnesses and authenticated before any mayor or other public officer of the country where it bears date, such copy being taken in a cause wherein the original is pro-

Digitized by Google

duced by a witness who refuses to part with it, and being certified and deposited in the same cause ;—Ibid. s. 11. [I. 121 to 123.]

The original powers of attorney mentioned in the preceding paragraphs numbers five and six, are held to be duly proved : but the truth of the exemplifications, probates, certificates or extracts, and the original powers of attorney mentioned in this article, may be denied and proof thereof be required in the manner provided in the Code of Civil Procedure.—Ibid. ss. 7, 9, 12. [I. 123, III. 383.]

Amendments :—1. All copies of acts of the legislature of any of the provinces forming the dominion of Canada, or of any colony, province or territory hereafter admitted into the union constituting the said dominion, printed by a queen's printer, or other printer by authority, for the government of any of the said provinces, colonies or territories, shall be conclusive evidence in this province of such acts and of their contents ; and every copy purporting to be so printed shall be deemed to be so, until the contrary is proved.

2. All copies of official documents, proclamations or announcements, printed by a queen's printer, or other printer by authority, for the government of any of the said provinces, colonies or territories, shall be conclusive evidence in this province of such documents, proclamations and announcements, and of their contents ; and every copy purporting to be so printed shall be deemed to be so, until the contrary is proved.—Q. 31 Vict. cap. 18.

1. Sections one, two, three and four of chapter ninety of the consolidated statutes for Lower Canada are repealed and are replaced by the following sections :

" 1. In any suit brought in this province upon a judgment rendered out of the Dominion of Canada, any defence set up or that might have been set up to the original suit, may be pleaded to the suit upon such judgment."

" 2. In any suit brought in this province upon a judgment rendered by a provincial court in any other province of the Dominion of Canada, in a suit in which personal service was made on the defendant within such other province or in which in the absence of such personal service the defendant appeared, no defence that might have been set up to the original suit can be made and pleaded to the suit upon such judgment."

" 3. In the case of a suit against a corporation, service within such other province on the officer or officers indicated in the charter or in the law under which the charter has been granted, or if such officer or officers cannot be found within such other province, service

Digitized by Google

therein on any person through whom by the law of such other province a valid service on such corporation can be made, shall be held to be personal service to bring the case under the provisions of the preceding section."

"4. In any suit brought in this province upon a judgment rendered by a provincial court in any other province of the Dominion of Canada, in a suit in which the defendant was not personally served within such other province, or in which in the absence of personal service he did not appear, any defence that might have been set up to the original suit, may be made and pleaded to the suit upon such judgment."

2. This act shall not apply to judgments now rendered nor to pending cases.—Q. 40 Vict. cap. 14.

DECISIONS:—1. Action will lie on a foreign judgment notwithstanding anything in the ordonnance of 1629 to the contrary.—C. R.—*King vs Demers*, 15 L. C. J., p. 129.

2. In a suit upon a foreign judgment, if the exemplification shows no cause of action, nor that the defendant was duly summoned and regularly condemned, the action must be dismissed.—C. R.— *May vs Ritchie*, 16 L. C. J., p. 81, 3 R. L., p. 440.

3. In an action on a foreign judgment and the usual assumpsit counts, where the plaintiff only fyles a copy of the judgment which does not reveal the cause of indebtedness, he will be ordered to fyle an account.—TORRANCE, J.—*Holmes vs Cassils*, 21 L. C. J., p. 28.

4. In a suit on a judgment obtained in Ontario, where it was admitted that the summons in the original suit had been served personally on the Defendant, in Quebec, it was held that he was not entitled to raise any objection which he might have urged in the original suit.—C. R.—*Alcock vs Howie*, 22 L. C J., p. 145.

5. A foreign judgment, to have extra-territorial effect and force, must be for a definite sum and must have been pronounced by a Court having competency according to the rules of private international law. According to such rules, international jurisdiction is founded either upon the Defendant's domicile or presence in the territory of the foreign tribunal, or on his possession of property within such territories. Therefore, when the exemplification of judgment fyled did not, on its face, show the international competency of the foreign court, and there was no evidence to establish the existence of any of the cases which would have conferred such international competency, the action was dismissed.—WURTELE, J, —*Stacey vs Beaudin*, 9 L. N., p. 363.

6. That an affidavit of the death of a person out of Lower Canada, purporting to be sworn before a foreign notary, does not make proof of its contents.—Q. B.—*Quinn & Dumas*, 23 L. C. J., p. 182.

7. Que lorsqu'il appert par la preuve faite qu'à l'endroit où on allègue que deux personnes ont été mariées dans les Etats-Unis d'Amérique, il n'y avait pas alors de régistres réguliers et authentiques, tels que requis par la loi du Canada, et que vû le laps de temps et l'absence de tels régistres, un certificat de tel mariage, sous l'article 1220 C. C. ne pourrait être obtenu même si ces régistres

Digitized by Google

eussent existé, le dit mariage peut être prouvé par témoins. Que la preuve du décès d'une personne, qui s'est noyée dans un endroit non habité de cette Province, où il n'y aurait pas de prêtre ou ministre, magistrat ou coroner, et où aucun régistre d'état civil n'était tenu ou connu, peut être faite par témoins.—Q. B.—*Cutting & Jordan*, 10 R. L., p. 401.

8. Qu'un mariage contracté où il n'y a ni prêtre ou ministre, ni magistrat, ni aucune autorité religieuse ou civile et ni aucun registre peut être établi par preuve verbale.—CARON, J.—*Fraser vs Pouliot*, 13 R. L., p. 1.—Q. B.—13 R. L., p. 520, 8 L. N., p. 178, 12 Q. L. R, p. 327.—SUPREME COURT:—4 S. C. R., p. 515, 10 L. N., p. 12.

9. Que la procuration consentie devant un notaire, à New-York, authentiquée par le greffier de la Cour Supérieure du même endroit et déposée à Hull, Bas-Canada, chez un notaire public, est valable, et tel notaire peut aussi valablement en délivrer des copies qui pourront être exhibées en Cour avec la même efficacité qu'un acte authentique.—C. R.—*Marston vs Pelletier*, 14 R. L., p. 251, 29 L. C. J., p, 335.

10. Qu'une simple dénégation du jugement rendu et des faits y contenus est nulle et non avenue; le défendeur doit procéder contre le jugement comme la loi l'indique pour les pièces authentiques.—JETTÉ, J.—*Dunbar vs Almour*, M. L. R., 3 S. C., p. 142.

11. Que le demandeur n'ayant pas prouvé la loi d'Ontario ni montré en quoi elle diffère de la loi de la Province de Québec, il faut prendre pour avéré que les deux lois sont identiques. Que les tribunaux de cette Province ne sont pas tenus de prendre judiciairement connaissance des statuts passés dans les autres provinces du Canada, mais que ces lois doivent être produites et prouvées dans la cause pour y faire preuve.—Q. B.—*Primeau vs Giles*, 31 L. C. J., p. 271.

§ 4. *Of private writings.*

1221. A writing which is not authentic by reason of any defect of form, or of the incompetency of the officer, avails as a private writing, if it have been signed by all the parties; saving the provisions contained in article 895. [I. 123, III. 383.]

1222. Private writings acknowledged by the party against whom they are set up, or legally held to be acknowledged or proved, have the same effect in making proof between the parties thereto, and between their heirs and legal representatives, as authentic writings.—Pothier, *Oblig.*, 742-3; C. S. L. C., ch. 83, § 2, sec. 86; C. N., 1322. [I. 123.]

DECISIONS:—1. A receipt in full given by a clerk only empowered to give receipts for money which he receives, is not conclusive evidence.—K. B.—*Munroe vs Heggins*, 2 R. de L., p. 279.

2. An agreement in writing *sous seing privé* is not null because it is not made in duplicate.—C. R.—*Shaw vs McConnell*, 4 L. C. R., p. 176.

3. A document *sous seing privé* containing the stipulation of a *contrat synal-*

Digitized by Google

lagmatique is valid and its production to prove the respective engagements of the parties thereto is sufficient, although it be neither executed in duplicate or declared to have been so executed.—TASCHEREAU, J.—*Lampson vs McConnell*, 14 L. C. R., p. 44.

4. Entries in merchants' books regularly kept and unchanged during a term of years, with an annual rendering of accounts to creditors conformable to such entries, make proof against such merchants, particularly after the death of creditors.—SUPREME COURT.—2 S. C. R., p. 26, 21 L. C. J., p. 169.—Q. B.—21 L. C. J., p. 92.

5. The onus of proof where a bank alleges that it has paid out money on a check, the genuineness of which is denied by the depositor, is on the bank which made the payment.—Q. B.—*Clark & Exchange Bank of Canada*, 3 L. N., p. 45.

6. The signature to a promissory note, which is denied, cannot be proved solely by comparison of the disputed signature with other signatures which are admitted to be genuine.—Q. B.—*Paige & Ponton*, 26 L. C. J., p. 155.

7. Where the plaintiff, a depositor in a bank, sued for a sum of $510 which he alleged to be the balance due him, and the bank pleaded payment of a cheque for that amount, which was produced, and the plaintiff alleged that it was a forgery, it was held to be the bank's duty to prove that the signature was genuine and that they had failed to do so.—Q. B.—*Clark & Exchange Bank of Canada*, 3 L. N., p. 45.

8. Qu'un reçu sous croix, devant deux témoins, est valable et peut être prouvé par les témoins présents, lors même que l'un d'eux ne sait pas signer et aurait apposé sa marque ou croix.—Q. B.—*Querret dit Latulippe & Bernard*, 1 Q. B. R., p. 69.

9. That a note signed with a cross does not make proof of itself and proof must be made of the signature in order to obtain judgment thereon.—WURTELE, J. —*Fiset vs Pilon*, 9 L. N., p. 380.

10. That a promissory note, sign with a cross is not a private writing which makes proof between the parties, without evidence of its execution.—WURTELE, J.—*Banque Nationale vs Charrette*, 10 L. N., p. 85.

1223. If the party against whom a private writing is set up do not formally deny his writing or signature in the manner provided in the Code of Civil Procedure, it is held to be acknowledged. His heirs or legal representatives are only obliged to declare that they do not know his writing or signature.—C. C. P., 145; C. S. L. C., c. 83, s. 86; C. N., 1324. [I. 123.]

DECISIONS:—1. In a defendant by exception admits his signature to a note of hand and pleads a term for payment, it is not necessary for the plaintiff to prove the signature, even if the exception be dismissed and there is a *défense en fait*.—K. B.—*Vallières vs Roy*, 2 R. de L., p. 335.

2. Where two persons sued jointly on a writing plead together to the merits, they cannot afterwards urge that the signature to the writing is not the signature of both or of either of them, more especially in the absence of an affidavit denying the signature, as required by C. C. P. 145.—Q. B.—*Déry & Hamel*, 7 L. N. p. 405.

Digitized by Google

3. No affidavit is required for the mere allegation that what is written over the stamp is not true.—McCord, J.—*Banque Jacques-Cartier vs Coté*, 9 Q. L. R., p. 139.

See also cases noted in Foran's C. C. P. at art. 145.

1224. In the case of formal denial by a party of his writing or signature, or in the case of a declaration by his heirs or legal representatives that they do not know it, proof must be made in the manner provided in the Code of Civil Procedure.—C. N., 1324. [I. 123.]

1225. Private writings have no date against third persons but from the time of their registration, or from the death of one of the subscribing parties or witnesses, or from the day that the substance of the writing has been set forth in an authentic instrument.

The date may nevertheless be established against third persons by legal proof.—Pothier, *Oblig.*, 750; Registry Law, C. S. L. C., pp. 349-50; 5 Marcadé, pp. 56, 57, 58; 10 Pand. Franç., p. 345; C. N., 1328. [I. 123.]

DECISIONS:—A deed of sale or cession of *droits de succession* duly enregistered, does not require signification. An *acte sous seing privé* subsequently passed between the parties, purporting to annul and set aside the deed of cession, but which *acte sous seing privé* has been neither registered nor signified, does not give the *cédant* a right of action.—C. R.—*Sauvé vs Sauvé*, 1 L. N., p. 546.

2. In a suit by the assignees of a creditor to recover the amount of a notarial obligation in his favor, the Defendant may successfully oppose thereto a release in his favor executed by such creditor *sous seing privé*, without proof that the same was really executed at the time it purports to have been signed. —Q. B.—*Prévost & Mélancourt*, 23 L. C. J., p. 166.

1226. The rule declared in the last preceding article does not apply to writings of a commercial nature. Such writings are presumed to have been made on the day they bear date, in the absence of proof to the contrary.—1 Taylor, *Evid.*, 153, n. 137; 3 Lower Canada Reports, *Hays & David*; 1 Nouguier, p. 82. [I. 123, III. 383.]

DECISION:—The holder of a promissory note is not bound to prove that the note was really made at the date which it bears. The date makes proof of itself.—Mackay, J.—*Hutchins vs Lohen*, 14 L. C. J., p. 85.

1227. Family registers and papers do not make proof in favor of him by whom they are written. They are proof against him:

1. In all cases in which they formally declare a payment received;

2. When they contain express mention that a minute is made to supply a defect of title to a person in whose favor an obligation is

Digitized by Google

declared to exist.—Cod., L. 7, *De probat.;* Pothier, *Oblig.*, 758, 759; Boisceau, part. 2, ch. 8, n. 14; C. N., 1331. [I. 123 to 125.]

DECISION :—Que lorsque la seule preuve offerte contre les héritiers et ayans cause d'un marchand consiste en la production de ses livres, celui qui veut les invoquer ne peut les diviser en admettant ce qui lui est favorable et en refusant d'admettre ce qui est contraire à sa prétention. Que les entrées de ces livres ne peuvent être divisées et qu'on ne peut y invoquer ce qui est au débit du marchand sans admettre ce qui est à son crédit.—C. R.—*Bilodeau vs Lemieux*, 13 Q. L. R., p. 181.

1228. What is written by the creditor on the back or upon any other part of the title which has always remained in his possession, though the writting be neither signed nor dated, is proof against him when it tends to establish the discharge of the debtor.

In like manner what is written by the creditor on the back or upon any other part of the duplicate of a title or of a receipt is proof, provided such duplicate be in the hands of the debtor.—Pothier, *Oblig.*, 760, 761; C. N., 1332. [I. 125.]

1229. No indorsement or memorandum of any payment upon a promissory note, bill of exchange or other writing, made by or on behalf of the party to whom such payment is made, is received in proof of such payment so as to take the debt out of the operation of the law respecting the limitation of actions.—C. S. C., ch. 67, sec. 4. [I. 125.]

DECISION :—The endorsement of payments on a promissory note is not an interruption of prescription. The limitation of five years operates as a statute of repose which extinguishes the debt, and nothing less than a new promise in writing can suffice to found an action upon. Any endorsement of interest or part payment of principal should be written by the debtor and signed by both parties. STUART, J.—*Caron vs Cloutier* 3 Q. L. R., p. 230.

SECTION III.—OF TESTIMONY.

1230. The testimony of one witness is sufficient in all cases in which proof by testimony is admitted.—C. S. L. C., c. 82, sec. 16, p. 698. [I. 125.]

DECISIONS :—1. In an action for slander where only one witness could swear to the slanderous, words being uttered, such evidence was held insufficient for of want corroboration.—MEREDITH and BADGLEY, JJ.—*Ferguson vs Gilmour*, 5 L. C. R., p. 145.

2. In an action for damages by the father of a minor for rape, where the case was sustained merely by the evidence of the girl and there was

Digitized by Google

counter-evidence to the effect that the girl's character was equivocal, the action could not be maintained.—TASCHEREAU, J.—*Bigonesse vs Brunelle*, 27 L. C. J., p. 372.

1231. All persons are legally competent to give testimony, except:

1. Persons deficient in understanding, whether from immaturity of age, insanity or other cause;

2. Those insensible to the religious obligation of an oath;

3. Those civilly dead;

4. Those declared infamous by law;

5. Husband and wife, for or against each other.—Pothier, 823; C. S. L. C., *ibid.*, sec. 14; 1 Greenleaf, *Ev.*, 365, 368, 572; Taylor, *Ev.*, p. 1091. [I 125.]

Amendments:—The Insolvent Act of 1875 and amending acts (since repealed) authorized the examination of the husband or wife of the Insolvent.—D. 38 Vict. chap. 16, s. 26, 39 Vict. cap 30, s. 5.

Article 252, of the code of civil procedure, is hereby amended, by adding thereto the following paragraph:

"Nevertheless, if consorts are separated as to property, and one of them, as agent, has administered property belonging to the other, the concert who has so administered may be examined as a witness in relation to any fact connected with such administration; provided the court or judge shall, in view of the circumstances of the case, deem it just and advisable to order such examination. Whenever such examination shall be allowed, it shall be as unrestricted as would have been that of the other consort, whether as regards the admissibility of verbal evidence or otherwise."—Q. 35 Vict. cap. 6, s. 9.

DECISIONS:—1. The notary or notaries who have received, or the *témoins instrumentaires* who have witnessed, the execution of a will or authentic instrument, are competent witnesses upon a proceeding upon an *inscription en faux* impugning the validity of such will or other authentic instrument.—DUVAL and MEREDITH, JJ.—4 L. C. R., p. 228.

2. Under C. S. L. C., cap. 82, ss. 14 and 15 a Defendant sued personally and as authorizing his wife, who was also a Defendant, may be examined as a witness on behalf of the Plaintiff.—SMITH, J.—*Dillon vs Harrison*, 14 L. C. R., p. 96.

3. Where a wife *séparée de biens* from her husband, carries on trade and commerce through her husband, authorized as her agent to that effect, under power of attorney, the said husband may be examined as a witness against his wife.—BERTHELOT, J.—*Ireland vs Maume*, 10 L. C. J., p. 28.

4. Notwithstanding sec. 10 of Insolvent Act of 1864, sub-sec. 4, which authorizes the examination of any person upon oath respecting the estate of the insolvent, the wife of an insolvent cannot legally be examined concerning his estate.—BADGLEY, J.—*Feron & Whyte*, 10 L. C. J., p. 111.

Digitized by Google

5. The husband of a *marchande publique séparée de biens* by marriage contract, who is merely brought into the cause to authorize his wife, is not a "party in a cause" within the meaning of C. S. L. C., c. 82, sec. 15, and cannot be examined as a witness for or against his wife. The rule of law prohibiting husband and wife from being examined for or against each other in civil cases, suffers no exception in the case where the husband is the agent of his wife, a *marchande publique*, and sole manager of her business under a power of attorney.—Q. B.—*Ireland & Duchesnay*, 2 L. C. L. J., p. 227.

6. Under the Quebec Act, 35 Victoria, chap. 6, sec. 9, the right to examine a consort as a witness is conferred upon the adverse party only.—JOHNSON, J.—*Bush vs Stephens*, 17 L. C. J., p. 140.

7. Un mari sera entendu comme témoin dans une cause où son épouse est demanderesse, lorsque celle-ci a déclaré dans sa déposition que c'est son mari qui gère ses affaires et administre ses biens.—LORANGER, J.—*Johnson vs Martin*, 5 R. L., p. 336.

8. In commercial cases the attorney in the cause can be heard as a witness on behalf of the parties whom he represents.—JOHNSON, J.—*Mélançon vs Beaupré*, 6 R. L., p. 509.

9. That the attorney of record, even in a non-commercial case, may be heard as a witness on behalf of his client, if parole evidence be admissible.—MEREDITH, C. J.—*Rev. Dames Ursulines vs Egan*, 6 Q. L. R., p. 38.

10. DORION, C. J., loq. It is a great abuse for advocates engaged in a case to appear as witnesses if it can be avoided. In any event, the lawyer should first set out in an affidavit what his evidence would be.—Q. B.—*Molson & Carter*, 3 L. N., p. 258.

11. The bailiff who made the service can be examined as a witness provided it be not to prove admissions made or statements made at the time of the service.—STUART, J.—*Garneau vs Courchène*, 6 Q. L. R., p. 34.

12. La section 9 du chapitre VI des Statuts de Québec de 1871, 35 Victoria, décrétant que si les époux sont séparés de biens, et que l'un d'eux, comme agent, a administré les propriétés de l'autre, l'époux qui a ainsi administré pourrait être examiné comme témoin sur tous les faits qui ont concerné telle administration, doit s'entendre que l'époux pourra être examiné comme témoin de la partie adverse seulement, et non comme le témoin de l'autre époux.—CARON, J.—*Fourquin vs McGreevy*, 9 R. L., p. 383.

13. Similar decision.—LAFRAMBOISE, J.—*Lareau vs Beaudry*, 22 L. C. J., p. 336.

14. Similar decision.—BEAUDRY, J.—*Foisy vs Lefebvre*, 4 R. L., p. 564.

15. In an action for a penalty for the sale of intoxicating liquors, the bailiff who served the defendant's attorneys with notice of the inscription of the case is not competent to give evidence relating to the sale of liquors made by the defendant.—MATHIEU, J.—*Rivard vs Courtemanche*, 11 R. L., p. 103.

16. Que l'époux séparé de biens et défendeur ne peut être témoin du demandeur sur la contestation d'une opposition afin de distraire, faite par la femme du défendeur.—Q. B.—*Brunelle & Bergeron*, 14 R. L., p. 501.

17. The affidavit of a person since deceased does not make evidence.—SUPREME COURT.—*Gagnon vs Prince*, 7 S. C. R., p. 386.

18. Where an action of damages was instituted against a chemist, arising from injuries suffered through an explosion of chemicals caused by the act of his unlicensed apprentice, who was himself killed by the explosion, and there was

Digitized by Google

no other living eye-witness of the facts, the statement made by such apprentice to his master, the defendant, in explanation of the circumstances, is admissible as evidence, not as absolute proof, but as explanatory and corroborative of the circumstantial proof.—DAVIDSON, J.—*Laskey vs Lyons*, M. L. R., 4 S. C., p. 4.

1232. Testimony given by a party in a suit cannot avail in his favor.

A witness is not rendered incompetent by reason of relationship or of being interested in the suit; but his credibility may be affected thereby.—Greenleaf, *Evid.*, nn. 365 et seq. and generally ch. 4, part. 2, and ch. 2, part. 3; C. S. L. C., *ibid.*, sec. 14, 16. [I. 125.]

Amendment:—Any passenger who produces such check (*to wit, the check whcih Railway Companies are bound by law to affix to passengers' baggage*) may himself be a witness in any action or suit brought by him against the company to prove the contents and value of his baggage not delivered to him.—R. S. C., cap. 109, s. 25, s. s. 4.

DECISIONS:—1. The maker of a promissory note payable to the order of the Defendant and by the Defendant endorsed to the Plaintiff, is a competent witness for the Defendant.—C. R.—*McDonald vs Seymour*, 6 L. C. R., p. 102.

2. To an action on several promissory notes N. pleaded usury and produced F., maker of part of the notes and endorser of the others, as a witness.—*Held:* that this kind of interest only affects F.'s credibility, not his competency to be a witness.—C. R.—*Malo vs Noye*, 1 L. C. J., p. 11 and p. 155.

3. A person who receives money from the maker of a note before its maturity and undertakes to pay it, is not a competent witness for the Defendant in an action against the maker to prove that he did so; for in the event of a judgment for the Plaintiff, he would be liable over to the Defendant for the costs of such action as damages for the non-fulfilment of his undertaking.—C. R.—*Fraser vs Bradford*, 2 L. C. J., p. 111.

4. In an action against a Defendant as having been partner in a firm alleged to have been dissolved and insolvent, the evidence of one partner is inadmissible to prove that the Defendant was a member of the firm.—SMITH, J.—*Chapman vs Masson*, 8 L. C. R., p. 225.

5. The maker of a promissory note, impleaded with the indorser, may be a witness for such indorser.—Q. B.—*Woodbury & Garth*, 9 L. C. R., p. 438.

6. The minor may be interrogated on matters within his cognizance, in causes instituted for him by his tutor.—TORRANCE, J.—*Forget dit Depaty vs Senécal*, 4 L. N., p. 85.

7. In an action against the executors of a will, one of the executors who is a legatee under such will and also individually sued, is a party to the suit, and cannot be examined on behalf of the estate of which he is an executor in a separate defence by it.—RAINVILLE, J.—*Ontario Bank vs Mitchell*, 5 L. N., p. 154.

8. That such executor having renounced as such legatee, but being a Defendant individually and liable *solidairement*, as having endorsed the note sued on, is still incompetent as a witness for the estate, although he has pleaded separately.—JETTÉ, and TORRANCE, JJ.—*Ontario Bank vs Mitchell*, 5 L. N., p. 155.

9. A party who has no personal interest in the action or proceeding, although

Digitized by Google

individually named in the record, (*i. e.* a party acting *en autre droit*) may be examined as a witness on behalf of the parties whom he represents.—Q. B —*Fair & Cassils*, 2 Q. B. R., p. 1.

10. Que le tuteur plaidant en nom qualifié pour son pupille, est témoin compétent pour ce dernier, et que sa crédibilité peut seul être affectée par sa position dans l'instance.—CASAULT, J.—*Thompson vs Pelletier*, 7 Q. L. R., p. 59.

11. The minor daughter is a competent witness for her parent to prove acts of violence done to her person while a member of his family.—TASCHEREAU, J.—15 L. C. R., p. 102. (*Memo.* This case was reversed in appeal so far as the right of the father to bring, in his own name, an action for the seduction of his daughter, a minor.—Q. B.—13 Q. L. R., p. 195.)

12. Lorsque deux membres d'une société dissoute sont poursuivis conjointement pour une dette de la ci-devant société, et se séparant dans leurs défenses, l'un peut être entendu comme témoin de l'autre.—ANDREWS, J.—*McCone vs Poulin*, 14 Q. L. R., p. 182.

13. See case noted at C. C., 1233 n. 31.

1233. Proof may be made by testimony:

1. Of all facts concerning commercial matters;

2. In all matters in which the principal sum of money or value in question does not exceed [fifty dollars;]

3. In cases in which real property is held by permission of the proprietor without lease, as provided in the title *Of Lease and Hire;*

4. In cases of necessary deposits, or deposits made by travellers in an inn, and in other cases of a like nature;

5. In cases of obligations arising from quasi-contracts, offences, and quasi-offences, and all other cases in which the party claiming could not procure proof in writing;

6. In cases in which the proof in writing has been lost by unforeseen accident, or is in the possession of the adverse party or of a third person without collusion of the party claiming, and cannot be produced;

7. In cases in which there is a commencement of proof in writing;

In all other matters proof must be made by writing or by the oath of the adverse party.

The whole, nevertheless, subject to the exceptions and limitations specially declared in this section, and to the provisions contained in article 1690.—C. S. L. C., pp. 698, 699, 400; Ord. de Moulins (1566), art. 54; Ord. de 1667, tit. 20, art. 2, 3, 4; 9 Toullier, nn. 20, 26; 3 Zachariæ, § 596, p. 517, note 1; Bornier, n. 99; 5 Marcadé, 1341, p. 100; Pothier, *Oblig.*, 772, 801, 809-814, 815; Merlin, Rép., vo *Preuve*, sec. 2, § 3, art. 1, n. 16; Serpillon sur Ord. 1667, pp. 317, 318; Greenleaf, *Evid.*, sec. 558, sec. 84, n. 2; C. N., 1341. [I. 125 to 127, III. 384.]

Digitized by Google

DECISIONS :—Summary of the decisions noted hereunder.

Decisions under § 1.....	nn. 1 to 22	Decisions under § 7 (*a*) Commencement of proof in writing	nn. 37 to 55
" " § 2.....	" 23 " 27		
" " § 3.....	" 28 " 30	Decisions under § 7 (*b*) Miscellaneous	nn. 56 to 80
" " § 4.....	" 31 " 34		
" " § 6.....	" 35 " 36		

PAR. 1.—1. A contract of insurance against fire may be made and provided without writing. A transfer although notarial of a mortgage, the subject of insurance, does not destroy the insurable interest then existing, a *contre lettre sous seing privé* from the transferer showing that the transfer was nominal. A clause in the act constituting the charter of an incorporated Insurance Company providing " that all policies of insurance whatever made under the authority of this Act " (6 Vict., cap. 22, s. 4) or of the ordinance aforesaid which shall be subscribed " by any three Directors of the said corporation and countersigned by the " Secretary and Manager and shall be under the seal of the corporation shall be " binding upon the corporation though not subscribed in presence of a Board of " Trustees, provided such policies be made and subscribed in conformity to a by-" law of the corporation," does not exclude other means of proving a contract of assurance consented to by them.—Q. B.—*Montreal Assurance Co. & McGillivray* 8 L. C. R., p. 401.

2. As between traders, in the case submitted, the clerk who has given a receipt on behalf of his employer is a competent witness to prove the circumstances under which such receipt was given and that there was error.—Q. B.—*Whitney & Clark*, 9 L. C. R., p. 339.

3. The maker of a note inpleaded with the endorser may be a witness for such endorser.—Q. B.—*Woodbury & Garth*, 9 L. C. R., p. 438.

4. An action lies by the maker of a note against the executors of the payee to get possession of the note paid by one of them in part to the payee thereof and partly to his executors. In such an action, the evidence is to be regulated by the law of England and parol evidence of such payment is legal evidence.—Q. B.—*Carden & Finley*, 10 L. C. R., p. 255.

5. A promise by an endorser to pay the amount of a note which had not been protested is valid, if made after knowledge of there being no protest made. Such promise may be proved by parol evidence. The promise made to an agent authorized to collect the note, has the same effect as if made to the creditor himself.—MONK, J.—*Johnson vs Geoffrion*, 13 L. C. R., p. 161.

6. Although the following of the art of photography is carrying on trade, nevertheless the engagement of a party to whom the photographer pays a salary, at the same time that he instructs him in the art, cannot be considered as a commercial contract, and therefore to be admitted to prove such engagement and contract by parol evidence, a *commencement de preuve par écrit*, is necessary.—TASCHEREAU, J.—*Jones vs Jones*, 16 L. C. R., p. 296.

7. Dans une affaire de commerce on peut produire des témoins pour expliquer une convention qui n'est pas clairement définie dans un reçu qui a été accordé et qui est produit.—C. R.—*Garth vs Woodbury*, 1 L. C. J., p. 43.

8. To prove the payment of a promissory note, recourse must be had to the laws of England. The payment of such note may be proved by parol testimony. —Q. B.—*Carden & Finley*, 8 L. C. J., p. 139.

9. An agreement to release the maker of a negotiable promissory note, made

Digitized by Google

after the signing and before the maturing of the note, may be proved by parol evidence.—BERTHELOT, J.—*Gole vs Cockburn*, 8 L. C. J., p. 341.

10. En matière de commerce, le créancier d'une obligation et d'un compte courant postérieur à la date de l'obligation, devrait être admis à faire preuve par témoins d'une convention verbale par laquelle il avait été stipulé que les paiements à être faits seraient d'abord imputés sur le compte courant.—SMITH, J.—*Lalonde vs Rolland*, 10 L. C. J., p. 321.

11. L'aveu du défendeur, dans son plaidoyer, qu'il y a eu délivrance de 122 bottes n'est pas suffisant pour autoriser une preuve verbale de la vente de 800 bottes de foin à $11.50, mais il faut que le demandeur prouve cette vente par écrit. Pour pouvoir prouver une vente au-dessus de $50.00 il ne faut pas être seulement commerçant, mais faire commerce des objets qui sont en contestation. —BEAUDRY, J.—*Guernon vs Lacombe*, 4 R. L., p. 385.

12. Dans les causes pour affaires commerciales, le procureur en loi peut être entendu comme témoin des parties qu'il représentait.—JOHNSON, J.—*Melançon vs Beaupré*, 6 R. L., 509.

13. Dans une action pour le recouvrement du montant d'une police d'assurance émanée sur une application qui contient des ratures et des allégués contradictoires quant à la somme à assurer, la preuve testimoniale sera admise pour prouver le montant de l'assurance.—Q. B.—*Ætna Life Insce. Co & Brodie*, 8 R. L., p. 91.

14. Proof may be made verbally by a broker, through proper witnesses, of a contract of agency by which he was commissioned to buy, but not of the carrying into effect of the contract of purchase.—Q. B.—*Trenholme & McLennan*, 24 L. C. J., p. 305, 3 L. N., p. 35.

15. Que d'après notre droit, le chèque ou mandat à ordre est un effet de commerce, surtout s'il est signé par un commerçant, et le paiement peut en être prouvé par témoins lors même que la somme réclamée excède $50.—CHAGNON, J. —*Baril vs Tétrault*, 29 L. C. J., p. 208.

16. Que l'insolvabilité complète ne peut être prouvée par témoins.—C. R.— *Labelle vs Sayer*, 10 R. L., p. 545.

17. Qu'un tiers peut prouver, par témoins, l'existence d'une société.—PAPINEAU, J.—*Lemire vs Bourdeau*, 12 R. L., p. 362.

18. Qu'il est permis à un tiers de prouver l'existence d'une société et qu'une société est simulée, par preuve testimoniale.—MATHIEU, J.—*Graham vs Bennett*, 12 R. L., p. 448.

19. Que la libération d'une condamnation judiciaire pour dette commerciale ne peut pas, si le jugement excède $50, être prouvée par témoins.—C. R.— *Dominion Type Co. vs Pacaud*, 10 Q. L. R., p. 354.

20. Qu'un défendeur poursuivi pour $158.40, prix d'une machine à lui vendue et qui plaide qu'il n'a reçu cette machine qu'à l'essai et que n'en ayant pas été satisfait, il a informé le vendeur d'avoir à la reprendre, tel que convenu, peut prouver son plaidoyer par témoins.—TASCHEREAU, J.—*Chapin vs Whitfield*, M. L. R., 2 S. C., p. 187.

21. Que la preuve par témoins d'une dation en paiement d'une dette commerciale peut être admise.—Q. B.—*Labrecque & Dubois*, 14 Q. L. R., p. 72.

22. Que le contrat pour la construction de l'entourage (avec couronnement en granit) d'un lot de cimetière, par un marbrier qui en fournit les matériaux, est un contrat commercial et un louage d'ouvrage et non une vente, et qu'il peut être

Digitized by Google

prouvé par témoin même lorsqu'il excède $50.00.—CASAULT, J.—*Morgan vs Turnbull*, 14 Q. L. R., p. 121.

PAR. 2—23. In an action for $37, balance of a debt of $72, due under a notarial obligation can, payment be proved by parole evidence? The negative was held by order at enquête and the affirmative by judgment in term.—MEREDITH, C. J.—*Massé vs Coté*, 5 Q. L. R., p. 145.

24. Que le paiement d'une somme excédant $50, pour la dernière année d'intérêts sur le capital de deux obligations différentes et la reconnaissance faite par le créancier, que tous les arrérages d'intérêts ont été payés, ne peuvent être établis par la preuve testimoniale, lors même que l'intérêt annuel sur chaque obligation serait d'une somme moindre que $50.—RAINVILLE, J.—*Montchamps vs Perras*, 24 L. C. J., p. 231.

25. See also the same point discussed in the case of,—C. R.—*Bethune vs Charlebois*, 23 L. C. J., p. 222.

26. Que la preuve du gage peut se faire par témoin, lorsque la créance est inférieure à $50, bien que les objets donnés en gage excèdent cette valeur.—MATHIEU, J.—*David vs Perreault*, 15 R L., p. 74.

27. Que l'on peut prouver par témoins le paiement de diverses sommes d'argent audessous de $50.00 chacune, payées à diverses époques quoique le total excède $50.00.—PAPINEAU, J.—*Mayer vs Léveillé*, M. L. R., 3 S. C., p. 190.

See also cases nn. 65, 67, 78 and 80.

PAR. 3—28. In an action for rent where the lessee by his plea or otherwise admits the existence of a verbal lease and occupation, the lessor may prove by witnesses the value and duration of the occupation. The lessee, by one of his pleas, having admitted that he had to pay £180 of rent, and assessments, the court which maintains the demand of the lessor for £250 of rent, will not also allow him for the assessments which are only admitted or proved by such plea; in a word, the court will not divide the admission in the plea. The defendant having admitted by one of his pleas, the existence of a verbal lease, the admission of this plea will be taken against him, although the defendant have also pleaded the general issue.—Q. B.—*Viger & Béliveau*, 7 L. C. J., p. 199.

29. Parol evidence of a verbal notice of continuation of a lease is admisible under the circumstances of the present case, the Plaintiff having acknowledged before witnesses that he had received such notice from the Defendant.—C. R.—*Saunders & Déom*, 15 L. C. J., p. 265.

30. A tender of rent not being a commercial matter cannot be proved by parol evidence.—TORRANCE, J.—M. L. R., 1 S. C., p. 451.

PAR. 4.—31. The owner of a trunk, which has been lost by the negligence of a common carrier, may in a suit against the carrier prove by his own oath (*ex necessitate rei*) the contents and value of the articles therein contained.—(See amendment to C. C. 1232.) BRUNEAU, J.—*Robson vs Hooker*, 3 L. C. J., p. 86.

31*a*. Similar decision:—BADGLEY, J.—*Macdougall vs Torrance*, 4 L. C. J., p. 132.

31*b*. Similar decision:—MATHIEU, J.—*Nelson vs Canadian District Tel. Co.*, 6 L. N., p. 184.

31*c*. Similar decision:—MEREDITH, J.—*Cadwallader vs Grand Trunk Ry. Co.*, 9 L. C. R., p. 169.

32. The placing of a horse in charge of a person to be pastured is not a

Digitized by Google

dépôt which can be proved by witnesses, when the sum or value involved exceeds $50. The *aveu* of the defendant in such case, that he received the horse but that he subsequently delivered it back to plaintiff, cannot be divided.—TORRANCE, J.—*Johnson vs Longtin*, 24 L. C. J., p. 292, 3 L. N., p. 86.

33. Que celui qui a déposé, dans un bureau d'une compagnie d'expédition, une somme excédant $50, peut prouver, par témoin, que l'agent de la compagnie a compté l'argent, même si le reçu qu'il a donné déclare seulement qu'il a été représenté que le paquet contenait une somme déterminée.—Q. B.—*Canadian Express Co & Letourneau*, 13 R. L., p. 693.

34. See case of—Q. B.—*Talbot & Blanchet*, 2 R. C., p. 238, noted at this article, number 46.

PAR. 6.—35. The contents of a lost document can be proven by verbal testimony after the loss is established by affidavit, which is the regular way of proving such loss.—BADGLEY, J.—*Russel vs Guertin*, 10 L. C. J., p. 133.

36. An action will lie for the recovery of the amount of a lost promissory note and the loss is sufficiently proved by the oath of the party. The holder must give guarantee to the debtor for any other claim or action upon such note. —Q. B.—*Carden & Rinter*, 15 L. C. R., p. 237.

PAR. 7.—37. Action pour inexécution de promesse de mariage exige un commencement de preuve par écrit.—K. B.—*Asselin vs Belleau*, 1 R. de L., p. 46.

38. A writing or a commencement of proof in writing is necessary to establish a promise of marriage.—WURTELE, J.—*Cameron vs Steele* 11 L. N., p. 234.

39. An admission upon *faits et articles* that the defendant was indebted to the plaintiff, not for money lent as demanded, but for a balance due for land sold by a notarial *acte*, was held to be a *commencement de preuve par écrit* and to admit the plaintiff to prove that the *acte* had been settled and receipted and the balance lent to the defendant.—K. B.—*Blais vs Moreau*, 3 R. de L., p. 355.

40. Un contrat d'une nature exécutoire ne peut pas être prouvé par témoins même sous l'empire de la jurisprudence française, sans un commencement de preuve par écrit.—SMITH, J.—*Trudeau vs Ménard*, 3 L. C. J., p. 52.

41. A sends a letter missive to a notary public in the following terms : " Je prends la liberté de vous transmettre sous ce pli, deux transports de créance " à moi faits par A. H. Leclaire, écr., marchand de notre village, et qu'il m'a " demandé de placer entre vos mains pour collection ; à cette fin je vous " inclue la procuration nécessaire. Je désire que vous donniez l'avis néces- " saire aux différents débiteurs du transport qui m'a été fait de leur créance, etc., " etc. M. Leclaire m'a dit qu'il s'était entendu avec vous au sujet de la rémuné- " ration de vos services en cette affaire, etc." *Held* :—That such letter missive was a sufficient *commencement de preuve par écrit* to entitle A. to adduce parol evidence to establish the existence of an understanding between the notary and Leclaire, A's *cédant*, that the notary was to look to Leclaire for his fees. The claim of a notary public for professional services is not a commercial matter and therefore the English rules of evidence do not apply.—Q. B.—*Thomas & Archambault*, 9 L. C. J., p. 203.

42. Answers of a party on *faits et articles* shall have a retroactive effect and will, as a *commencement de preuve par écrit*, legalize oral evidence previously produced to prove an agreement above the sum of $25.00, notwithstanding the said evidence was objected to at the time and a motion made to have it rejected.— C. R.—*Beaudry vs Ouimet*, 9 L. C. J., p. 158.

Digitized by Google

43. An obligation entered into by a married woman *séparée de biens* for a debt due by her husband, will be declared null at the instance of a third party in the case. To be admitted to disprove the contents of such an instrument by oral evidence, there must be a *commencement de preuve par écrit.*—TASCHEREAU, J.—*Fuchs vs Talbot*, 13 L. C. R., p. 494.

44. Held in the Superior Court.—A party to a case cannot be examined as a witness to contradict a notarial instrument without a *commencement de preuve par écrit* be first obtained by examining such party on interrogatories *sur faits et articles.* In appeal, the judgment was confirmed without reference to the above point.—Q. B.—*Foley & Charles*, 15 L. C. R., p. 248.

45. La possession en fait de meubles équivaut à un commencement de preuve par écrit, suffisant pour permettre au possesseur d'expliquer sa possession par une preuve testimoniale.—C. R.—*Lefebvre vs Bruneau*, 14 L. C. J., p. 268.

46. In an action for the recovery of property lost by the plaintiff and found by the defendant, the only proof of the finding was the admission of the defendant. *Held:* that verbal evidence thereof could be adduced without a *commencement de preuve par écrit.*—Q. B.—*Talbot & Blanchet*, 2 R. C., p. 238.

47. The question in this case was whether an amount of 768 livres, amount of a transfer dated some twelve years back, had been included in an obligation subsequently given and which had been paid. The decision of this question depended upon the further question—whether there was a *commencement de preuve par écrit*, so as to render parol evidence admissible. The court below, although admitting that there were strong grounds for believing that the money had been paid, was yet of opinion that there was no *commencement de preuve par écrit*, and, rejecting the parol testimony of payment, condemned the defendant to pay the amount. The higher court held that there was such proof in the receipt signed by the plaintiff himself and that the parol evidence based upon that receipt fully established the pretensions of the appellant.—Q. B.—*Lavoie & Gagnon*, 1 L. C. L. J., p. 35.

48. Where an action was brought for the price of a horse sold and delivered and the defendant being examined, stated that the horse was received by him on trial, even if the transaction were treated as a non-commercial one, this answer made a *commencement de preuve par écrit*, and oral evidence was admissible on the part of the plaintiff to prove the sale.—Q. B.—*Cox & Patton*, 18 L. C. J., p. 316.

49. A mandate to an attorney *ad litem* to file an opposition to a seizure cannot be proved by verbal evidence without a *commencement de preuve par écrit.*—TORRANCE, J.—*Longpré vs Pattenaude*, 20 L. C. J., p. 28.

50. Que la vente ou promesse de vente d'un immeuble peut être prouvée par témoin, pourvu qu'il y ait un commencement de preuve par écrit.—Qu'une lettre d'un propriétaire à son agent, l'autorisant à vendre un immeuble, pourvu que l'acquéreur s'engage à y construire un moulin à farine immédiatement est un commencement de preuve par écrit suffisant pour permettre à l'acquéreur de prouver, par témoins, tous les faits établissant qu'il y a eu vente ou promesse de vente.—Q. B.—*Nault & Price*, 4 Q. B. R., p. 348.

51. What would be sufficient to form a *commencement de preuve par écrit* for a loan or a *dépôt*, is not sufficient in a contract for the sale of land.—C. R.—*Anctil vs Déchène*, 6 Q. L. R., p. 317.

52. A cross-question put by the party who is sought to be declared by by the plaintiff father to an illegitimate child, cannot form a *commencement de preuve*

Digitized by Google

par écrit. It might perhaps suffice if it were a question in examination-in chief, and put by the party to his own witness. (See C. C. 232.)—C. R.—*Turcotte vs Nacké*, 7 Q. L. R., p. 196.

53. That the testimony of the Plaintiff's *auteur*, admitting that he had sold a portion of a lot of land to the Defendant, will not be taken as a *commencement de preuve par écrit*, entitling the Defendant to produce verbal evidence of ownership.—C. R.—*Lecompte vs Laflamme*, 9 Q. L. R., p. 140.

54. Que le fait de dater un écrit constatant une vente d'un lieu autre que celui où l'écrit est fait et signé, constitue un commencement de preuve par écrit suffisant pour faire admettre la preuve testimoniale, quant à l'endroit où la vente constatée par l'écrit a eu lieu.—MATHIEU, J.—*Riopelle vs Fleury*, 12 R. L., p. 85.—PRIVY COUNCIL.—12 App. Cas., p. 110, 13 Q. L. R., p. 286.

55. Action by Respondent against Appellant for $625.45, being balance of of price of goods sold and delivered. Appellant tenders $52.25, and denies purchase of the remainder. Those last goods were sent by Grand Trunk Ry. to Appellant at Chatham, Ont., and by him returned to Respondent who refused to take them. No writing to prove sale according to art. 1235 of C. C. But there is a letter wherein Appellant says he declines to take the goods because they are charged too high. Is this a *commencement de preuve par écrit* entitling Respondent to complete by verbal evidence? *Held* it is.—*Lamont vs Ronayne & Brown*, M. 15 sept. 1874. Noted at art. 1235 DeBellefeuille's C. C.

MISCELLANEOUS :—

56. A discharge signed with a cross in the presence of witnesses for a sum exceeding one hundred francs is valid.—Q. B.—*Nevin & DeBleury*, 12 L. C. R., p. 117

57. The registers of baptisms, marriages and deaths are only *prima facie* evidence of the truth of the declarations therein, foreign to the celebration, and these declarations may be disproved by contrary evidence.—Q. B.—*Sykes & Shaw*, 15 L. C. R., p. 304.

58. Where the defendant in an action for tithes, pleaded that he was not a member of the Roman Catholic Church but was a Protestant and had given the *curé*, the plaintiff in the case, due notice thereof, such notice cannot be proved by parol evidence.—BERTHELOT, J.—*Proulx vs Dupuis*, 16 L. C. R., p. 172.

59. The gift of moveable effects by parents to their child, followed by tradition and possession, is complete without the necessity of any written contract to establish the same.—Q. B.—*Mahoney & McCready*, 15 L. C. R., p. 274, 1 R. C., p. 237.

60. Verbal evidence is not admissible of a gift (*don manuel*) accompanied by delivery.—C. R.—*Badgley vs Loranger*, 1 R. C., p. 237.

61. The parol testimony of witnesses is admissible to prove the fact of a gift in certain cases coming within the clause of *don manuel*.—PRIVY COUNCIL.—*Richer & Voyer*, 5 App. Cas., p. 461, 5 R. L., p. 591.

62. Du consentement des parties, des arbitres et amiables compositeurs furent nommés avec pouvoir, "après avoir été dûment assermentés," d'entendre les parties et leurs témoins, "les dits témoins étant d'abord dûment assermentés "devant un commissaire de la cour supérieure." Les arbitres firent un rapport dans lequel ils dirent "qu'après avoir été dûment assermentés," avoir entendu les parties et les témoins, dûment assermentés devant un commissaire, ils étaient de l'opinion énoncée par eux. Aucune copie de la formule du serment administré ou aucun certificat ne furent produits. Sur motion du demandeur que les arbi-

Digitized by Google

tres n'étaient pas tenus de produire leurs notes des témoignages et les papiers produits devant eux ; et sur motion du défendeur pour l'homologation du rapport, il fut ordonné que le rapport serait renvoyé aux arbitres pour production de la preuve qu'ils avaient été assermentés.—C. R.—*Joseph vs Ostell*, 2 L. C. R., p. 490, 1 L. C. J., p. 265.

63. In the case of a special legacy, in order to charge the legatee with the debts of the deceased it must be proved that the testator had left no other estate or effects and burden of proof of this fact rests on the creditor. In the absence of such proof, parol evidence of a promise by the legatee to pay a debt due by the testator is inadmissible.—C. R.—*McMartin vs Gareau*, 1 L. C. J., p. 286.

64. The observance of the required formalities preliminary to a sale of land belonging to minors, as, for example, that the required publications of such sale were duly made, cannot be established by verbal testimony.—DAY and MONDELET, JJ.—*Rustic vs McGregor*, 9 L. C. J., p. 332.

65. Une donation de choses mobilières d'une valeur excédant $50, ne peut pas être prouvée par témoins.—Q. B.—*Richer vs Voyer*, 15 L. C. J., p. 122.

66. La preuve orale à l'effet de prouver des documents sous la marque d'une croix, est légale.—BEAUDRY, J.—*Blackburn vs Decelles*, 15 L. C. J., p. 260.

67. On ne peut prouver par témoins une soumission de la part d'un entrepreneur, pour la construction d'une chapelle et sacristie, lorsque le prix de l'enprise excède $50. On ne peut prouver par témoins l'acceptation d'une telle soumission par les syndics, vu que le prix de l'entreprise excède $50, et que d'ailleurs les syndics formant une corpo ation, ils ne peuvent s'obliger que par écrit.—POLETTE, J.—*Chevrefils vs Les Syndics de la Paroisse de St Hélène*, 2 R. L., p. 161.

68. Un défendeur contre lequel un jugement a été rendu, pour une somme excédant $25, en 1859, pour délit d'élection, qui établit par témoins qu'un écrit fut donné par le demandeur au défendeur concernant le jugement, et que note fut enregistrée par un des témoins dans ses livres de compte d'un prêt d'une somme au défendeur pour s'acquitter, sera admis à jurer qu'il a perdu cet écrit et les circonstances de cette perte, et en ce cas la preuve testimoniale peut être admise. —SICOTTE, J.—*Guévremont vs Girouard*, 3 R. L., p. 36.

69. Le notaire peut être examiné comme témoin pour établir la vérité des faits contenus dans l'acte argué de faux.—SMITH, J—*Taillefer vs Taillefer*, M. C. R., p. 40.

70. Les témoins instrumentaires à un acte contre lequel une inscription en faux est formée, ne suffisent pas pour établir le faux.—C. R.—*Meunier vs Cardinal*, M. C. R., p. 34.

71. Le curé est témoin compétent sur une inscription de faux contre un registre de mariage.—C. R.—*Languedoc vs Laviolette*, M. C. R., p. 77.

72. A party having a *bonâ fide* equitable interest in a property of which the legal title appears to be in another, but of which he is in actual possession, may prove such equitable interest by verbal testimony.—TORRANCE, J.—*Whyte vs Home Insurance Company*, 14 L. C. J., p. 301.

73. A verbal evidence is inadmissible to prove payment of a debt due under a judgment, although the debt were originally of a commercial nature.—C. R.—*Miller vs Kemp*, 14 L. C. J., p. 74.

74. That a tender of rent, not being a commercial matter, cannot be proved by parol evidence.—TORRANCE, J.—*Macfarlane vs McIntosh*, M. L. R., 1 S. C., p. 451.

75. Proof by parol evidence of an alleged *compromis* between the parties,

Digitized by Google

cannot be made for the purpose of defeating an application for *péremption d'instance*.—TORRANCE, J.—*Phaneuf vs Cochrane*, 22 L. C. J., p. 106.

76. Que sous le régime d'exclusion de communauté, la preuve testimoniale est admise relativement aux meubles acquis par la femme depuis le mariage. —CASAULT, J.—*L'Hôpital Général vs Gingras*, 10 Q. L. R., p. 230.

77. Que la preuve testimoniale est admise pour prouver l'erreur.—MATHIEU, J.—*Compagnie de Prêt et de Crédit Foncier vs Santerre*, 14 R. L., 453.

78. Qu'une réclamation de la part d'un avocat pour services rendus à un candidat durant son élection, telles que rédaction de circulaires, d'annonces dans les journaux, pas et démarches, obtention de signatures et de votes en faveur du candidat, organisation de comités et d'assemblées publiques, discours, etc, s'élevant à une somme excédant $50.00, ne peut être prouvée par témoins.—MATHIEU, J.—*Ethier vs Hurteau*, M. L. R., 4 S. C., p. 36.

79. That in the case of the attachment in revendication of a moveable, the parties may prove their respective rights by parol testimony whatever may be the value of the moveable so attached.—WURTELE, J.—*Sanche vs Sabourin*, 11 L. N., p. 218.

80. Que la preuve d'une condition de garantie dans une vente pour plus de $50.00 ne peut être faite par témoins.—Q. B.—*Tassé & Ouimet*, M. L. R., 3 Q. B., p. 312.

1234. Testimony cannot in any case, be received to contradict or vary the terms of a valid written instrument.—Cod., L. 1, *De Testibus*; Domat, liv. 2, tit. 6, sec. 2, n. 7; Pothier, *Oblig.*, 793; Ord. de 1667, tit. 20, art. 2; 1 Greenleaf, *Ev.*, nn. 275 et seq.; C. N., 1341. [I. 127.]

DECISIONS:—1. Upon exceptions by a woman *séparée de biens* alleging that the obligation upon which she has been sued was given by her for debts contracted by her husband in violation of the ordinance 4 Vict., cap. 30, s. 36, oral evidence will be admitted against a notarial deed.—Q. B.—*Mercille & Fournier*, 9 L. C. R., p. 300.

2. The holder of a promissory note to order under protest who has received an account from the maker and another note at three months, retaining the first note as security for the second, does not lose his recourse against the endorsers of the first note who have given their assent to the transaction, notwithstanding the insolvency of the maker of the first note. Under such circumstances parol evidence may be received to explain the receipt and the circumstances under which it was given. The maker of the note, impleaded with the endorser, may be a witness for such endorser.—Q. B.—*Woodbury & Garth*, 9 L. C. R., p. 438.

3. In an action by a lessor against a lessee for rent due under a lease executed before notaries, it is lawful for the lessee to plead that he did not obtain possession of the premises leased at the time mentioned in the said lease and by reason thereof that he has suffered damages.—Q. B.—*Belleau & Regina*, 12 L. C. R., p. 40.

4. Held by the Superior Court (Badgley, J.) that a party to a case cannot be examined as a witness to contradict a notarial instrument without a *commencement de preuve par écrit* be first obtained by examining such party on interrogatories *sur faits et articles*. The judgment rendered in the case was confirmed

Digitized by Google

in Appeal without reference to the above point.—Q. B.—*Joley & Charles*, 15 L. C. R., p. 248.

5. Parol evidence will not be admitted to contradict or vary the receipt set up in the case, which must be assimilated to a written contract and therefore not to be altered by the evidence of witnesses.—LORANGER, J.—*West vs Fleck*, 15 L. C. R., p. 422.

6. In an action against the payer and endorser of a promissory note, endorsed in blank, the defendant pleaded: 1. The insufficiency of the presentment and protest; 2. That when the plaintiff took the note it was under an agreement to release the defendant from all liability and that the defendant put his name on the note simply to convey it to the plaintiff. *Held*:—That parol evidence could not legally be adduced to prove the agreement that the defendant should incur no liability by reason of his endorsing the note, inasmuch as such evidence tends to vary and defeat a contemporaneous written document. The judgment of the Court below being founded on the irregularity of the protest and on such parol evidence, must be reversed.—Q. B.—*Chamberlin & Ball*, 11 L. C. R., p. 50, 5 L. C. J., p. 88.

7. A Bill of Lading, as between the parties thereto, may be explained by parol evidence.—BADGLEY, J.—*Fowler vs Stirling*, 3 L. C. J., p. 103.

8. Parol testimony was received to prove a verbal agreement extending the terms of a written contract filed in the cause, affecting a sum above $50.00.—JOHNSON, J.—*Easman vs Roland*, 2 L. C. L. J., p. 216.

9. Lorsqu'un acte passé par un notaire a été rédigé et lu par ce dernier dans une langue étrangère à une des parties contractantes, et que ne comprenait pas cette partie contractante, il y a lieu pour cette dernière de faire preuve par temoins que l'acte en question ne renferme pas la convention des parties et que dans ce cas, il n'est pas nécessaire de recourir à l'inscription de faux pour faire annuler l'acte.—C. R.—*Noble vs Lahaye*, 1 R. L., p. 197.

10. Un tiers peut prouver outre et contrairement à un acte auquel il n'était pas partie.—BEAUDRY, J.—*Girard vs Bradstreet*, 4 R. L., p. 376.

11. Un témoin peut être interrogé sur la considération d'un acte d'obligation produit et consenti en sa faveur, quoique cet acte constate que l'obligation a été consentie pour valeur reçue par argent prêté et que la partie qui interroge le témoin s'appuie sur cet acte.—LORANGER, J.—*Johnston vs Martin*, 5 R. L., p. 336.

12. Dans une poursuite par un commis contre son patron, en vertu d'un engagement par écrit, le défendeur ne sera pas admis à prouver d'autres conventions que celles portées dans l'écrit.—C. R.—*Lemontais vs Amos*, 5 R. L., p. 353.

13. La femme séparée de biens peut s'obliger conjointement et solidairement avec son mari, et son obligation sera jugée valable, s'il est prouvé qu'elle a profité de la transaction. Pour se faire relever de son obligation, elle doit prouver que le créancier savait, au moment du contrat, qu'elle ne s'obligeait que comme caution de son mari.—Nonobstant toute déclaration contraire dans un acte authentique, il est loisible à la femme de faire la preuve testimoniale des faits propres à démontrer qu'elle n'est intervenue que comme caution de son mari.—Dans l'espèce actuelle, nulle preuve n'a été faite que le créancier ait participé en aucune façon quelconque à la fraude que l'intimé allègue avoir été pratiquée à son égard, tandis qu'au contraire il est établi que le prêt a été fait à elle-même et qu'il a servi à payer des dettes personnelles.—Q. B.—*Malhiot & Brunelle*, 15 L. C. J., p. 197.

Digitized by Google

14. It is not competent, either for the notary who receives an award of arbitrators or for one of the arbitrators, to give evidence explanatory of certain expressions in such award.—MACKAY, J.—*Colson vs Ash*, 18 L. C. J., p. 191.

15. In commercial cases, parol evidence may be adduced to establish an alleged error in a written contract.—Q. B.—*Ætna Life Insurance Co. & Brodie*, 20 L. C. J., p. 286.

16. The testimony of the notaries, before whom a deed has been executed, to the effect that essential formalities which on the face of the deed appear to have been accomplished, were not so, if alone and uncorroborated, is insufficient to establish that the deed is *faux*.—Q. B.—*Larochelle & Proulx*, 1 Q. L. R., p. 142.

17. When a clerk gave a receipt purporting to cover rent to the 1st October, and it was contended that this was an error and should have read to the 1st August only, the clerk was allowed to contradict the receipt by his evidence, as also the plaintiff's attorney.—CARON, J.—*Worthington vs Jacques*, 3 L. N., p. 143.

18. Where the defendant, by an agreement in writing, undertook to grind the green furnished by the plaintiff in pure linseed oil, the defendant cannot be allowed to prove, by testimony, that the plaintiff verbally requested him to use other materials.—Q. B.—*Dominion Oil Cloth Co. & Martin*, 6 L. N., p. 344.

19. That, as all testamentary dispositions must be in writing and verbal evidence cannot be received outside of the *acte*, no witnesses to the will or notaries who prepared it can be heard, on pretext of its obscurity, to state what it was the intention of the testator to effect by the will, but it is from the *acte* itself that the judge must gather the testator's wishes. Nevertheless, witnesses may be heard to prove the degree of relationship between parties and their relations with each other and the importance of his patrimony compared with legacies.—MATHIEU, J.—*De Salaberry vs Faribault*, 11 R. L., p. 621.

20. That parol evidence will be allowed to prove the usual interpretation to be given to certain words in a charter party, when, without such evidence, these words would not have a plain meaning.—ALLEYN, J.—*Caird vs Webster*, 9 Q. L. R., p. 158.

21. Qu'on peut prouver, par témoin, une remise ou une novation d'une créance de moins de $50, constatée par écrit.—MATHIEU, J.—*Labelle vs Pesant dit Sans-Cartier*, 14 R. L., p. 306.

22. Que la preuve testimoniale est admise pour prouver l'erreur.—MATHIEU, J.—*Compaguie de Prêt et de Crédit Foncier vs Santerre*, 14 R. L., p. 453.

23. Que dans l'espèce il était permis à l'appelante de suppléer au contrat quant à la valeur, par la preuve du *quantum*, mais que la preuve testimoniale de toute convention, quant au lieu où l'ouvrage devait être fourni, était illégale; qu'en l'absence de convention sur ce point, le fait devait être déterminé par l'usage.—Q. B.—*O'Keefe & Desjardins*, 30 L. C. J., p. 280, 4 Q. B. R., p. 300.

24. Que l'article 1234 C. C., ne s'applique pas à la partie, qui peut admettre et avouer, même lorsqu'elle est entendue comme témoin, que l'écrit valablement fait ne contient pas toutes les conventions qu'elle a faites.—MATHIEU, J.—*McConnell vs Millar*, M. L. R., 2 S. C., p. 270, 14 R. L., p. 587.

25. The respondent, by notarial agreement, leased to appellant the right to mine for asbestos on certain property belonging to respondent. Subsequently, the respondent agreed to reduce the amount of royalty he was to receive, but to what extent the parties did not agree. The appellant kept no regular books, but his son-in law and agent, at all events for some purposes, kept full accounts and

Digitized by Google

the appellant was in the habit of referring those who dealt with him to this agent and he had even paid respondent on the statements of this agent. *Held:* That the appellant was bound by the statement of account of such agent, the amount so fixed being less than the respondent would be entitled to under the original agreement.—Q. B.—*Jeffery & Webb*, M. L. R., 3 Q. B., p. 147.

26. The respondents, consignees at Montreal, under a written agreement of appellants, in Belfast, Ireland, accounted from time to time for the goods consigned to them, but never made any return for the price of the cases in which the goods were packed. These cases were always charged in the appellants accounts, but the only reference made by the appellants to the omission to account for the packing cases was contained in a letter in which they merely said: "We observe "you do not make any return for the cases." Three years later the account was closed without any reservation as to the packing cases. The appellants afterwards brought an action in *assumpsit* for the price of the cases. HELD:—That the action could not be maintained, seeing that the appellants had notice during three years, through the respondents' accounts, that the packing cases were not being allowed for and that parol evidence was inadmissible to vary the terms of the written agreement by proving that there was an understanding that the cases should be paid for.—Q. B.—*Ulster Spinning Co & Foster*, M. L. R., 3 Q. B., p. 396, 11 L. N., p. 86, 32 L. C. J., p. 159.

27. See cases noted at C. C., 1169 & 1961.—Q. B.—*Shaw & Lloyd*, 13 Q. L. R., p. 125.

See also cases noted at C. C. 1208 and 1211.

1235. In commercial matters in which the sum of money or value in question exceeds [fifty dollars,] no action or exception can be maintained against any party or his representatives unless there is a writing signed by the former, in the following cases:

1. Upon any promise or acknowledgement whereby a debt is taken out of the operation of the law respecting the limitation of actions;

2. Upon any promise or ratification made by a person of the age of majority, of any obligation contracted during his minority;

3. Upon any representation, or assurance in favor of a person to enable him to obtain credit, money or goods thereupon;

4. Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain;

The foregoing rule applies although the goods be intended to be delivered at some future time or be not at the time of the contract ready for delivery.—C. S. L. C., c. 67, ss. 2, 6, 7, 8; Imp. Stat. 29 Car. II, c. 3, s. 17. [I. 127 to 129.]

DECISIONS:—1. No action is maintainable against a person for a promise made to pay a commercial debt contracted while a minor, unless such promise be in writing.—BERTHELOT, J.—*Mann vs Wilson*, 3 L. C. J., p. 337.

Digitized by Google

2. Les mots du § 4 de l'art. 1235 du C. C. B. C.: "*De tout contrat pour la "vente d'effets,*" comprennent la vente de billets, etc., promissoires. Partant la vente de tels billets pour un montant d'au-delà de $50, ne peut être prouvée par témoins sans un écrit signé par celui qui les a achetés.—*Semble:* Que les mots de l'art. 1235: "*sans un écrit signé par elle,*" s'appliquent à un *commencement de preuve par écrit.*—Q. B.—*Truteau & Leblanc*, 4 R. L., p. 566.

3. Le statut des fraudes ne s'applique qu'aux ventes commerciales pures et simples et non aux contrats d'ouvrages pour objets non encore confectionnés. L'article 1235 du Code Civil ne s'applique qu'aux cas où le marchand qui trafique sur un article de commerce qu'il ne confectionne pas lui même, le fait confectionner ou l'achète de l'ouvrier ou d'autres négociants pour le revendre. Dans l'espèce actuelle le contrat a été pour objet particulier en dehors du commerce ordinaire de l'Intimé, et n'est pas une vente pure et simple, mais un louage d'ouvrage qui ne tombe pas sous le statut des fraudes.—Q. B.—*Donegani & Molinelli*, 14 L. C. J., p. 106.

4. The writing required by art. 1235 of the Civil Code to be signed by the party sought to be bound, is held to be signed, in the case of a contract of bargain and sale of goods, evidenced by the bought and sold notes, signed by the broker who negociates the sale. The broker may prove, by parol evidence, his authority to act for the parties, and the retention by the parties of the contract notes so signed is evidence of the authority of the broker to bind them in the form therein stated.—MACKAY, J.—*Lusk vs Hope*, 17 L. C. J., p. 19.

5. Proof by witnesses is inadmissible of a new sale between parties without a writing or without previous delivery.—TORRANCE, J.—*Beard vs McLaren*, 18 L. C. J., p. 76.

6. Interrogatories *sur faits et articles* may be taken *pro confessis*, without any motion to that effect. Interrogatories so taken *pro confessis*, when they furnish sufficient *commencement de preuve par écrit* may supply the want of the memorandum in writing required by art. 1235 of our Civil Code.—Q. B.—*Douglass & Ritchie*, 18 L. C. J., p. 274.

7. A clause in a deed of sale of a ship between J. and M. to which G. was no party, to the effect that J. who was to compiete the ship, should buy the timber required therefor from G., for which timber M. promised to accept and pay drafts drawn at six months, is a sufficient writing within art. 1235 C. C., and G. having acted thereon, with the knowledge and consent of M. (at whose instance the deed of sale had been verbally notified to him,) had a direct action against M. for the price of the timber so sold, the draft drawn for which he had refused to accept and pay.—Q. B.—*Michon & Gauvreau*, 1 Q. L. R., p. 27.

8. A sale or promise of sale cannot be proved against the principal, without a memorandum in writing, signed by the agent *before* the revocation of his authority.—Q. B.—*Lynn & Cochrane*, 23 L. C. J., p. 235.

9. The verbal testimony of one who was agent and afterwards testamentary executor of the debtor, deceased, cannot be received, after he has ceased to be executor, to prove an acknowledgment of a debt of the succession by him while executor, so as to take the debt out of the operation of the law respecting the limitation of actions.—Q. B.—*Pinsonneault & Desjardins*, 24 L. C. J., p. 100, 3 L. N., p. 29.

10. The true interpretation of the word "*acceptance,*" as used in C. C. 1235, *par.* 4, is to consider it as an acceptance in writing, or an acceptance accompanied

Digitized by Google

by some act, not mere words, or, that acceptance is the synonym of delivery. Proof of acceptance, without delivery, cannot be made by parol testimony. So, where it was admitted that there was no writing to establish the alleged contract, questions put to the witness tending to prove an acceptance of the goods, by words, were properly over-ruled.—These decisions were arrived at by the Court of Queen's Bench, but the Supreme Court decided:—That in an action upon an unwritten commercial contract for the sale of goods exceeding the sum of $50, oral evidence of acceptance *or* receipt of the whole or any part of the goods, is admissible, under C. C. 1235.—SUPREME COURT.—*Munn & Berger*, 10 S. C. R., p. 512, C. D., p. 454.—Q. B.—27 L. C. J., p. 349, 6 L. N., p. 363, 4 L. N., p. 218.

11. That proof of the acceptance of goods of a value exceeding $50, may be made by verbal testimony.—MACKAY, J.—*Lemonier vs Charlebois*, 5 L. N., p. 196.

12. A broker may prove by verbal testimony his authority to transact, but not the fact of a purchase and resale.—Q. B.—*Trenholme & McLennan*, 24 L. C. J., p. 305, 3 L. N., p. 35.

13. Que l'existence d'une société commerciale peut être prouvée par témoins vis-à-vis des tiers, mais que cette preuve n'est pas permise entre les associés.—PAPINEAU, J.—*Rowan vs Massé*, M. L. R., 1 S. C., p. 177.

14. Qu'il est permis à un tiers de prouver l'existence d'une société et qu'une société est simulée par preuve testimoniale.—MATHIEU, J.—*Graham vs Bennett*, 12 R. L., p. 448.

15. Que la preuve verbale produite pour prouver l'existence d'une société entre les intimés est illégale et insuffisante.—Q. B.—*Préfontaine & Barrie*, 13 Q. L. R., p. 312.

16, That the facts disclosed did not establish the existence of a partnership between the respondents, Knight and Cook, so as to render the latter responsible for debts contracted by the former towards the appellants.—Q. B.—*Singleton & Knight*, 14 Q. L. R., p. 39. 15 R. L., p. 216.—CASAULT, J.—13 Q. L. R., p. 70.

1236. In any action for the recovery of a sum which does not exceed [fifty dollars,] proof by testimony cannot be received if such sum be a balance or make part of a debt under a contract which cannot be proved by testimony.

The creditor may, nevertheless, prove by testimony a promise made by the debtor to pay such balance, when it does not exceed [fifty dollars.]—C. N., 1344. [I. 129.]

1237. [If in the same action several sums be demanded which united form a sum exceeding fifty dollars, proof by testimony may be received if the debts have arisen from different causes or have been contracted at different times, and each were originally for a sum less than fifty dollars.]—Ord. 1667, tit. 17, art. 4; Proc.-verbal des conférences, p. 217, opinion of Lamoignon against; C. N., 1345. [I. 129.]

Digitized by Google

SECTION IV.—OF PRESUMPTIONS.

1238. Presumptions are either established by law or arise from facts which are left to the discretion of the courts.—Cujas *in paratit. ad Tit. III*, Lib. XXII *Digestorum*, T. I, p. 678; Pothier, *Oblig.*, 840; Menochius, there cited; C. N., 1349. [I. 129.]

1239. Legal presumptions are those which are specially attached by law to certain facts. They exempt from making other proof those in whose favor they exist; certain of them may be contradicted by other proof; others are presumptions *juris et de jure* and cannot be contradicted.—Cujas, *loc. cit. suprà*; Cujas *ad Tit. XXIII, De præsumpt.*, T. 6, p. 869; Menochius, Lib. 1, Qu. 3, 1; Pothier, *Oblig.*, 481-3; C. N., 1352. [I. 129 to 131.]

DECISIONS:—1. In proving interruption of prescription of a note, a letter mentioning a note, will be presumed in the absence of evidence to the contrary, to refer to the note alleged to be prescribed.—C. R.—*Thompson vs McLeod*, 1 L. C. J., p. 155.

2. Le fait du paiement peut se présumer par le laps de temps ou par toute autre circonstance qui rend le fait probable.—TORRANCE, J.—*Allard vs Legault*, 13 L. C. J., p. 80.

3. No presumption can arise that a fire has been caused by the negligence of A. B., or his servants, from the mere fact that he occupied a portion of the building destroyed, the remainder of which was occupied by C. D., the proprietor of the building. The proof of negligence in such case must be direct and positive. —Q. B.—*Foster & Allis*, 16 L. C. J., p. 113.—C. R.—15 L. C. J., p. 13.

See also cases noted at C. C., 1629.

4. There is no presumption in law in favour of the validity of a patent.—ANDREWS, J.—*Allen & Reid*, 14 Q. L. R., p. 126.

NOTE.—Cases relating to presumptions of fraud, negligence, agency, undue influence in testamentary dispositions, etc., are to be found noted at the different articles of the Code refering to these subjects.

See also cases noted at C. C. 1242.

1240. No proof is admitted to contradict a legal presumption, when, on the ground of such presumption, the law annuls certain instruments or disallows a suit, unless the law has reserved the right of making proof to the contrary, and saving what is provided with respect to the oaths or judicial admissions of a party.—Menochius, Lib. 1, Q. 3, 18; Pothier, *Oblig.*, 841-3, 886-8; Toullier, T. X., p. 50; C. N., part of 1352. [I. 131.]

1241. The authority of a final judgment (*res judicata*) is a

Digitized by Google

presumption *juris et de jure;* it applies only to that which has been the object of the judgment, and when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon.—*ff De exceptione rei judicatæ*; Pothier, *Oblig.*, 61, 888, 897; Toullier, T. X., p. 88; C. N., 1351. [I. 131.]

DECISIONS:—1. An interlocutory judgment adopting, without opposition, the account of a succession prepared by its order, passes *in rem judicatam*, and it is not competent to the representatives of a minor, who was legally a party to the suit, to revive the proceedings and contest any particular item in the account. The Court, however, may rectify any error of calculation.—COURT OF APPEALS:—*Plenderleath & McGillivray*, Stuart's Rep., p. 470.

2. A judgment rendered against a principal debtor upon an issue raised by him is *res adjudicata* against the surety who was not a party to the original action. —DUVAL and MEREDITH, JJ.—*Brush vs Wilson*, 2 L. C. R. p. 249.

3. A judgment dismissing an hypothecary action for want of proof of possession by the Defendant of the property hypothecated, cannot be opposed by exception of *res adjudicata* to a subsequent demand founded on actual possesion, possession being a fact which is renewed from day to day.—Q. B.—*Nye & Colville*, 5 L. C. R., p. 408.

4. Un jugement rendu dans une demande en déclaration d'hypothèque condamnant le défendeur à délaisser et dont il a interjeté appel, n'est pas passé en force de chose jugée.—Q. B.—*Métrissé & Brault*, 2 L. C. J., 303.

5. La prescription créée par les articles 2260 et 2267 du Code Civil, n'étant pas seulement une présomption de paiement, mais une déchéance contre le créancier retardataire, et étant une présomption *juris et de jure* de l'extinction de la dette, elle n'admet pas de preuve contraire, et ne peut être infirmée par l'offre du serment décisoire. Mais dans les affaires commerciales, où la somme ou valeur dont il s'agit n'excède pas $50, on peut déférer le serment à la partie qui oppose la prescription sur l'existence d'une promesse ou reconnaissance verbale ou d'autre interruption ou renonciation qui ne lui permet que de l'invoquer. *Aliter* où la somme ou valeur excède $50.—CASAULT, J.—*Fuchs vs Légaré*, 3 Q. L. R., p. 11.

6. Where a motion in a cause has been dismissed upon argument and a subsequent motion to revise the former judgment has also been dismissed, the party moving will not be permitted to make a third motion aiming at the same object as the first motion, but such third motion will be dismissed.—BERTHELOT, J.—*Benjamin vs Wilson*, 6 L. C. J., p. 246.

7. The Commissioner's Court having no jurisdiction to try and determine cases relating to tithes, a judgment of that Court is radically null and has not the effect of *res adjudicata*.—POLETTE, J.—*Roy vs Bergeron*, 2 R. L., p. 533.

8. A judgment dismissing an action against the Defendant at the suit of the present plaintiff for the recovery of an instalment claimed as an assessment for the building of a Roman Catholic church, on the ground that the defendant was not a Roman Catholic, but a Baptist, was *chose jugée* between the parties and could be so pleaded in a subsequent action for another instalment, notwithstanding that the plaintiff, in such subsequent action, allege and prove a confession of faith as a Roman Catholic antecedent to the homologation of the report of the *syndics*.—SICOTTE, J.—*Syndics de Lacolle vs Duquette*, 15 L. C. J., p. 304.

Digitized by Google

9. A judgment founded upon the same title but for a different portion of the alleged debt, is not sufficient to support an exception of *chose jugée*.—BEAUDRY, J.—*Tait vs Nield*, 7 R. L, p. 224.

10. A petition to quash a capias was dismissed by one judgment, whereupon the petitioner inscribed anew on his petition and a second judgment was rendered quashing the capias. *Held*:—That all the proceedings subsequent to the first judgment were null.—Q. B.—*Major & Chadwick*, 8 R. L., p. 685.

11. The debtor does not represent the hypothecary creditor in suits relative to the hypothecated property, and the rescission pronounced against the first is not *chose jugée*, against the second. In this case A., the registered proprietor of the property bought it from B., and hypothecates it to C. At the instance of B., the sale of it to A. was annulled on the ground of fraud. The judgment was held not to be *chose jugée* against C.—CASAULT, J.—*Ouellette vs Rochette*, 9 Q. L. R., p. 289.

12. An action of damages will not lie against a party to a previous suit, by his adversary, for an alleged false affidavit, by which such party obtained a final judgment in his favor in the previous suit, the first judgment being *res adjudicata*. —Q. B.—*Boisclair & Lalancette*, 5 L. N., p. 266.

13. That the curator to a vacant estate, sued *en reddition de compte*, could not, under the circumstances, pray for the dismissal of the Plaintiff's action, on the ground that another similar case, still pending, had been previously instituted against him by another of the parties interested.—MEREDITH, C. J.—*Fraser vs Pouliot*, 7 Q. L. R., p. 149.

14. Que dans l'instance actuelle, il n'y a pas identité d'objet dans l'action en reddition de compte du demandeur et l'opposition de Jones, et qu'il n'y a pas en conséquence chose jugée.—CARON, J.—*Fraser vs Pouliot*, 13 R. L., p. 1.

1 . Qu'il y a chose jugée entre les parties, même pendant le délai accordé par la loi pour appeler d'un jugement.—RAINVILLE, J.—*Lureau vs DeBeaufort*, 6 L. N., p. 251.

16. Que le jugement rendu, sans fraude, contre le débiteur principal, est chose jugée contre la caution.—Q. B.—*Lamy & Drapeau*, 1 Q. B. R., p. 237, 7 Q. L. R., p. 383.

17. See Remarks of Ramsay, J. in case of—Q. B.—*Fraser & Jones*, 8 L. N., p. 178.

18. That where a judgment has been obtained by collusion, an opposition to the same will lie at the instance of third parties, although the opposants may have no interest within the jurisdiction, their interest in a foreign country having been prejudicially affected by such judgment.—GILL, J.—*Campbell vs Bate*, 15 R. L., p. 467.

19. Que les décisions d'un conseil local ne sont pas celles d'une cour de justice et n'ont pas l'autorité de la chose jugée.—C. R.—*Suitor vs Corporation de Nelson*, 14 Q. L. R., p. 11.

20. The exception of *chose jugée* cannot be pleaded when the conclusions of the second action are materially different from those of the first: and so, where, by the first action, the plaintiff sought to exercise a right of redemption without complying with the conditions agreed on, it was held that the dismissal of such action was not *chose jugée* as regards an action brought subsequently offering to comply with the conditions.—Q. B.—*Leger & Fournier*, M. L. R., 3 Q. B., p. 124. Confirmed in SUPREME COURT,—10 L. N., p. 324.

Digitized by Google

21. That a person who is sued for a debt which has been already paid and who, being unable at the time to prove payment, allows judgment to be obtained *ex parte* and pays the amount of the judgment, has a right, on establishing the fact of the previous payment to recover the amount so paid and the exception of *chose jugée* cannot in such case be pleaded to the demand.—GILL, J.—*Rohdt vs Gagnon*, 11 L. N., p. 186.

22. A judgment obtained against a tenant by default in a case of *saisie-gagerie*, declaring the seizure of certain effects good, is not *chose jugée* against him as to the ownership thereof in a case on a *capias* wherein he is accused of fraudulently secreting such effects, and it is competent for him to prove that they are the property of his wife.—C. R.—*Morris vs Wilson*, M. L. R., 3 S. C., p. 470.

1242. Presumptions not established by law are left to the discretion and judgment of the court.—Menochius, *Lib.* 1, 44; Pothier, *Oblig.*, 849; Toullier, T. 10, p. 29; C. N., 1353. [I. 131.]

Amendments:—The furnishing of copies, extracts, title-deeds or deeds of any nature whatsoever, is not to be considered a presumption of payment of the costs and fees of a notary. And no notary is bound to furnish copies or extracts of any deed, to third parties, or even to the parties themselves, if he is not paid the original cost of the minute, if at the time prescription has not been acquired.—Q. 39 Vict., cap. 33, s. 22. (The above Act was repealed by the Act hereafter cited.)

The furnishing of copies, extracts, title-deeds or deeds of any nature whatsoever, is not to be considered a presumption of the payment of the costs and fees of a notary.—Q. 46 Vict., cap. 32, s. 16.

DECISIONS:—1. Bien qu'une obligation fût consentie pour £53.6s., défaut de considération pour partie de l'obligation doit être inféré, du fait que les livres et comptes du créancier ne comportaient, lors de la passation de l'obligation qu'une balance en sa faveur de £34. 18s. 9d., et qu'il n'avait pas prouvé avoir vendu d'autres marchandises au débiteur pour compléter le montant de la dite obligation, et qu'en conséquence il devrait être condamné à donner quittance au débiteur s'il était prouvé que le montant de cette obligation avait été payé jusqu'à concurrence de cette somme de £34. 18s. 9d.—SMITH, J.—*Lalonde vs Rolland*, 10 L. C. J., p. 321.

2. Le fait du paiement peut se présumer par le laps de temps, ou par toute autre circonstance qui rend le fait probable.—TORRANCE, J.—*Allard vs Legault*, 1 R. L., p. 85.

3. Le donataire d'un immeuble qui est poursuivi par son donateur pour la résiliation de la donation, pour défaut d'accomplissement des charges imposées, doit dans cette instance réclamer le prix des améliorations qu'il prétend avoir droit de réclamer, et que son défaut de ce faire soulève une présomption légale qu'il n'y a point d'améliorations dont il aurait pu réclamer le prix ou qu'il a abandonné son droit de les réclamer.—LORANGER, J.—*Pearce vs Gibbon*, 6 R. L., p. 649.

See also cases noted at C. C. 1239.

Digitized by Google

SECTION V.—OF ADMISSIONS.

1243. Admissions are extra-judicial or judicial. They cannot be divided against the party making them.—Cujas, T. 9, c. 1013 D; Toullier, 10, p. 383; C. N., 1354. [I. 131.]

DECISIONS:—1. The *aveu* of the party can no more be divided to get a *commencement de preuve*, than to get complete proof.—Q. B.—*Christin & Valois*, 3 L. N., p. 59.

2. The defendant not having told the same story throughout, his admission was divisible.—Q. B.—*Cotnoir & Parenteau*, 3 L. N., p. 213.

3. The *aveu* of the party may be divided when part of the answer is improbable or invalidated by indications of bad faith.—TORRANCE, J.—*Montpetit vs Péladeau*, 4 L. N., p. 146.

4. Judicial admissions cannot be divided against the parties making them. —TORRANCE, J.—*O'Brien vs Molson*, 21 L. C. J., p. 287.—Q. B.—24 L. C. J., p. 43.

5. Where the defendant admitted that he had agreed to pay interest at the rate of eight *per cent.*, but added that he had paid all the interest that he had agreed to pay up to the date of the institution of the action, the *aveu* was held to be indivisible.—RAINVILLE, J.—*Montchamps vs Perras*, 24 L. C J., p. 231.

6. Where the defendant acknowledged that he had received the plaintiff's horse for purposes of pasturage, but added that he had returned it to the plaintiff, the *aveu* was held to be indivisible.—TORRANCE, J.—*Johnson vs Longtin*, 24 L. C. J., p. 292, 3 L. N., p. 86.

7. An admission, whether judicial or extra-judicial, cannot be divided, so as to make proof by a part thereof against the party making such admission.—Q. B.—*Sauvé & Denis dit Véronneau*, 24 L. C. J., p. 308.

Similar decisions.

8.—SUPREME COURT.—*Fulton & McNamee*, 2 S. C. R., p. 470, C. D., p. 225.

9.—Q. B.—*Pratt & Berger*, 28 L. C. J., p. 192. 7 L. N., p. 235.

10. Sous les circonstances, l'aveu de l'intimé qu'il a reçu de l'appelant une somme de $300, à titre de don et non de prêt peut être divisé, en vertu du §2 de l'article 231 du Code de Procédure Civile du Bas-Canada, pour permettre la preuve par témoins; qu'au contraire, la réponse que l'appelant a donné à l'intimé certains meubles et quelques effets mobiliers, ne peut être divisée, attendu qu'il n'existe aucune autre preuve, ni de la remise des effets, ni des circonstances sous lesquelles ils ont été remis.—Q. B.—*Raymond dit Lajeunesse & Latraverse*, 4 Q. B. R., p. 184, M. L. R., 1 Q. B., p. 321.

11. An admission by the Defendant, under oath, that he received a voluntary deposit, but had delivered it as requested, cannot be divided, and verbal testimony is not admissible to contradict the accessory statement of delivery, in a case where proof of the deposit could not be made by testimony.—C. R.—*Dubuque vs Dubuque*, 7 L. N., p. 32.

12. Que l'aveu sur faits et articles, dont la partie adverse n'a besoin que comme commencement de preuve par écrit ne peut être divisé, et ne peut autoriser la preuve testimoniale d'un prêt à un montant plus élevé qu'admis par l'avouant, et d'un autre qu'il prétend avoir en partie remboursé.—Q. B.—*Fournier & Morin*, 11 Q. L. R., p. 98.—C. R.—10 Q. L. R., p. 129.

Digitized by Google

13. Que l'aveu contenu dans la déposition, comme témoin, de l'emprunteur où, tout en admettant le prêt, il jure qu'il a payé la somme au prêteur, ne peut pas être divisé, et que, en l'absence de toute autre preuve de prêt, l'action pour le recouvrement de la somme prêtée doit être renvoyée ; mais que, au contraire, l'aveu du prêt, accompagné de l'affirmation de son extinction par compensation, eût été divisible et eût fait preuve du prêt, sans établir la créance compensable, ni l'extinction de l'obligation de l'emprunteur.—CASAULT, J.—***Marmen vs Marmen***, 10 Q. L. R., p. 32.

14. Que dans une cause en dommage pour assaut, le plaidoyer du coupable fait devant la Cour du Recorder dans une poursuite criminelle pour le même assaut, est une admission du fait de l'assaut dont le demandeur peut prendre avantage dans l'action civile.—TAIT, J.—***Fortier vs Sauvé***, M. L. R., 4 S. C, p. 30.

15. Que le défendeur en cette cause, ayant plaidé en niant l'emprunt allégué par le demandeur, ce plaidoyer est en contradiction avec l'aveu du défendeur sous serment reconnaissant avoir reçu l'argent, mais prétendant l'avoir payé, et que, sous les circonstances, telle contradiction autorise la divisibilité de l'aveu. Que dans l'instance, le défendeur étant tenu de plaider spécialement paiement pour être admis à faire valoir ce moyen d'exception; autrement la cour adjugerait au-delà des conclusions. (C. C. P., 17 and 136).—C. R.—***Barré vs Loiseau***, 32 L. C. J., p. 193.

1244. An extra-judicial admission must be proved by writing or the oath of the party against whom it is set up, except in the cases in which, according to the rules declared in this chapter, proof by testimony is admissible.—Pothier, *Oblig.* 834 ; Toullier, T. 9, p. 396 ; Ibid., T. 10, p. 406 ; C. N., 1355. [I. 131.]

1245. A judicial admission is complete proof against the party making it.

It cannot be revoked unless it is proved to have been made through an error of fact.—*ff* L. 1, 2, 4, *De confessis* ; *ff* L. 25, *De probationibus* ; Menochius, *præs.* 51, Lib. 2, Qu. 39 ; Pothier, *Oblig.*, 833 ; Toullier, 10, p. 383 ; Ibid., 11, p. 79 ; C. N., 1356. [I. 131.]

DECISION :—The admission on *faits et articles* of the existence of co-partnership by one of the alleged partners is not sufficient to make proof against the other.—DAY, J.—***Bowker vs Chandler***, M. C. R., p. 15.

SECTION VI.—OF THE OATHS OF PARTIES.

1246. A party may be examined under oath in like manner as a witness, or upon interrogatories on articulated facts or by decisory oath. And the court may, in its discretion, examine the parties or either of them in order to complete imperfect proof.—C. S. L. C., c.

Digitized by Google

82, sec. 15, 19, 20; *ff De jurejurando*; Cod., *De rebus creditis*; Pothier, *Oblig.*, 911, 912; Toullier, 10, p. 474; C. N., 1357. [I. 131 to 133.]

§ 1. *Of the decisory oath.*

1247. The decisory oath may be offered by either of the parties to the other, in any action in which the parties may legally bind themselves by admission or compromise, and without any commencement of proof.—*ff* L. 34, § 6, *De jurejurando*; Cod., L. 12, *De rebus creditis*; Cujas, *Observatio* 22, n. 28, tome III, col. 607; C. N., 1358, 1360. [I. 133.]

DECISIONS:—1. The prescription created by C. C. 2260 and 2267 is a presumption *juris et de jure* of the extinction of the debt and does not admit of contrary proof and cannot be annulled even by the decisory oath.—CASAULT, J.—*Fuchs vs Légaré*, 3 Q. L. R., p. 11.

2. Que lorsque le serment décisoire est déféré à une partie qui est dans l'impossibilité de l'accepter, parce qu'elle est paralysée, le juge refusera la délation du serment.—MATHIEU, J.—*Macdougall vs Roy*, 15 R. L., p. 406.

1248. It can only be offered upon a fact which is personal to the party to whom it is offered, or of which he has a personal knowledge.—*ff* L. 34, § 3, *De jurejurando*; Pothier, *Oblig.*, 912, 914; C. N., 1359. [I. 133.]

1249. He to whom the decisory oath is offered and who refuses to take it, and does not refer it to his adversary, or the adversary who refuses to take it, when it is referred to him, fails in his demand or exception.—*ff* L. 34, §§ 6, 7, L. 38, *De jurejurando*; Pothier, *Oblig.*, 916; C. N., 1361. [I. 133.]

1250. The oath cannot be referred when the fact which is the object of it is not personal or personally known to both the parties, but to him alone to whom it has been offered.—*ff* L. 34, §§ 1, 3, *De jurejurando*; Pothier, *Oblig.*, 916; C. N., 1362. [I. 133.]

1251. When a party to whom the decisory oath has been offered or referred has made his declaration under it, the adverse party is not admitted to prove its falsity.—*ff* L, 5, § 2, L. 9, § 1, *De jurejurando*; *ff* L. 15, *De exceptionibus*; Pothier, *Oblig.*, 916; C. N., 1363. [I. 133,]

1252. A party who has offered or referred the decisory oath

Digitized by Google

cannot retract after a declaration by the adverse party that he is ready to take the oath.—Cod., *De rebus creditis*, L. 11; Pothier, *Oblig.*, 915; C. N., 1364. [I. 133.]

DECISION:—A decisory oath cannot be withdrawn when the party to whom it is refered accepts the reference and declares himself ready to answer.—STUART, J.—*O'Farrell vs O'Neil*, 17 L. C. R., p. 80.

1253. The decisory oath cannot affect the rights of third persons, and it extends only to the things with respect to which it has been offered or referred.

[If offered by one of joint and several creditors to the debtor, it avails the latter for the part only of such creditor, subject, nevertheless, to the special rules applicable to commercial partnerships.]

If offered to the principal debtor it avails his sureties.

If offered to one of joint and several debtors, it avails his codebtors.

If offered to a surety it avails the principal debtor.

In the last two cases the oath of the codebtor or of the surety avails the other codebtors or the principal debtor only when it has been offered upon the fact of the debt and not solely upon the fact of the joint and several liability or of the suretyship.—*ff* L. 10, *De jurejurando*; *ff* L. 27, L. 28, *De jurejurando*; Pothier, *Oblig.*, 917, 918; 10 Toullier, 504-5; C. N., 133, 1198, 1365. [I. 133 to 135.]

§ 2. *Of the oath put officially.*

1254. The court may, in its discretion, examine either of the parties on oath, in order to complete the proof necessary for the decision of the cause, or for determining the amount for which judgment ought to be given; but only in cases where some proof has been made of the demand or exception.—*ff* L. 1, *De jurejurando;* Cod., L. 3, *De rebus creditis;* Vinnius, *Quæst. select.*, lib. 1, ch. 44; Pothier, *Oblig.*, 922; C. N., 1367. [I. 135.]

DECISIONS:—1. In an action against a common carrier to recover the value of goods lost, the Defendants, interrogated on *faits et articles* as to their value, replied that they had no idea. The Plaintiff offered his oath to establish the value, and the Court thereupon tendered the decisory oath to the Plaintiff.—C. R.—*Hobbs vs Sénécal*, 1 L. C. J., p. 93.

2. A merchant who proves that a person bought regularly from him and also that he furnished a large number of the articles mentioned in the account sued on and that his principal clerk at the time of the alleged sale had gone to the United States and that certain of the goods mentioned in the account had been used by the Defendant or his family, thereby establishes a sufficient

Digitized by Google

presumption in his favour for the admission of the supplementary oath, when the Defendant's main defence is that he had prohibited the Plaintiff to give credit to any member of his family.—SICOTTE, J.—*Bonnier vs Bonnier*, 3 R. L., p. 35.

3. Where a large number of articles had been seized by the Appellants as belonging to the husband of the Respondent, and the Court below had maintained an opposition *afin de distraire* fyled by the Respondent, in support of which her own oath was received to complete the proof of ownership, it was held that, under the circumstances, the oath had been properly submitted.—Q. B.—*May & L'Heureux*, 3 L. N., p. 110.

4. Que le serment supplétoire doit être laissé à la discrétion de la Cour de première instance, et que la Cour de Révision ne doit le décerner, lorsque la Cour de première instance a refusé de le faire, que dans un cas extrême, où il serait impossible d'arriver à une solution quelconque de la difficulté entre les parties. L'on décerne le serment supplétoire lorsque la preuve est incomplète ou douteuse, et la mauvaise foi n'est pas une raison de décerner le serment supplétoire. —Q. B.—*Daley & Chévrier*, 1 Q. B. R, p. 293, 4 L. N., p. 82.

5. In an action founded upon a detailed account, the Court cannot give judgment in favor of the Plaintiff upon his affidavit only, and in the absence of any other proof.—MCCORD, J.—*Plante vs Carrière*, 5 Q. L. R., p. 351.

6. That where there is no evidence of the cause of an accident, it is not a proper case for submitting the *serment supplétoire* and thus permitting the case to be proved entirely by the plaintiff's oath.—Q. B.—*Corporation of City of Sherbrooke & Short*, M. L. R., 3 Q. B., p. 50.

7. Where there is absolute proof of injuries resulting from chemical action and of an explosion having occured on the defendant's premises, which defendant is being sued for damages arising from such explosion) and the only eye-witness is dead, the Court will examine the plaintiff under C. C. 1245 and 1254 and C. C. P. 448.—DAVIDSON, J.—*Laskey vs Lyons*, M. L. R., 4 S. C. p 4.

1255. The oath put by the court officially to one of the parties cannot be referred by him to the other party.—Vinnius, lib. 1, ch. 43; Pothier, *Oblig.*, 929, from which this rule may be inferred; C. N., 1368. [I. 135.]

1256. The oath, upon the value of the thing demanded can only be put by the court officially to the party claiming when it is impossible to establish such value otherwise.—C. N., 1369. [I. 135.]

Digitized by Google

TITLE FOURTH.

OF MARRIAGE COVENANTS AND OF THE EFFECT OF MARRIAGE UPON THE PROPERTY OF THE CONSORTS.

CHAPTER FIRST.

GENERAL PROVISIONS.

1257. All kinds of agreements, may be lawfully made in contracts of marriage, even those which, in any other act *inter vivos*, would be void; such as the renunciation of successions which have not yet devolved, the gift of future property, the conventional appointment of an heir, and other dispositions in contemplation of death.—Lebrun, *Com.*, liv. 1, c. 3, n. 4; Renusson, *Com.*, part. 1, c. 4, n. 1; Pothier, *Com. Intr.*, nn. 1, 4, 6; *Orl. Intr.*, tit. 10, n. 34; 11 Pand. Franç., 222 et seq.; C. N., 1387; Thev. d'Ess. (Can. Ed.), p. 30. [II. 399.]

1258. All covenants contrary to public order or to good morals or forbidden by any prohibitory law, are, however, excepted from the above rule.—Authorities under preceding article; 11 Pand. Franç., 224 et seq.; C. N., 1387. [II. 399.]

1259. Thus the consorts cannot derogate from the rights incident to the authority of the husband over the persons of the wife and the children, or belonging to the husband as the head of the conjugal association, nor from the rights conferred upon the consorts by the title *Of Paternal Authority* and the title *Of Minority, Tutorship and Emancipation* in the present code.—*ff* L. 28, L. 38, *De pactis;* L. 5 § 7, *De administ. et pericul tut.;* L. 5, L. 6, *De pactis dotalibus;* Pothier, *Com., Intr.*, nn. 4, 5, 6, 7; *Orl., Intr.*, tit. 10, n. 34; Merlin, Rép., vo. *Renonciation*, § 1, n. 3, vo. *Séparation de biens*, sec. 2, § 5, n. 8; 11 Pand. Franç., 225 et seq.; C. N., 1388. [II. 399.]

1260. If no covenants have been made, or if the contrary have

Digitized by Google

not been stipulated, the consorts are presumed to have intended to subject themselves to the general laws and customs of the country, and particularly to the legal community of property, and to the customary or legal dower in favor of the wife and of the children to be born of their marriage.

From the moment of the celebration of marriage, these presumed agreements become irrevocably the law between the parties, and can no longer be revoked or altered.—Pothier, *Com. Intr.*, n. 18, 2e alin. *Com.*, nn. 4, 6, 7, 10, 21, *Obl.*, n. 844 *Mariage*, n. 47, 393; *Orl., Intr. tit.* 10, n. 32; C. N., 1393. [II. 401.]

DECISIONS:—1. A *communauté de biens* is by law presumed, until the contrary is shown, if the parties were married in Canada.—K. B.—*Roy vs Yon*, 2 R. de L., p. 78.

2. F., who lived at Abbitibbi, a post of the Hudson Bay Company in the heretofore Province of Upper Canada, came to Lower Canada, or in any event within the jurisdiction of the courts of Lower Canada, and was there married, when he immediately afterwards repaired with his wife to Abbitibbi where he continued to reside until his death. Held by the Superior Court (Smith, Vanfelsen, Mondelet, JJ., the latter dissenting) that the matrimonial rights relating to real estate belonging to the husband and purchased after the marriage must be governed by the law of the domicile of the parties at the time of the marriage and not the law of the place where the real property is situated. The Court of Queen's Bench, to which this case was carried, do not appear to have passed on this issue.—Q. B.—*McTavish & Pyke*, 3 L. C. R., p. 101.

2. See also cases noted at C. C. 6 and 80.

3. The law presumes personal property in the possession of married persons to be common property unless disproved by strict proof of individual property in the wife.—Brown & Badgley, JJ.—*Barbour vs Fairchild*, 6 L. C. R., p. 113.

4. A marriage contracted in the United States between two parties having their domicile in Lower Canada though one of them (the wife) was a minor and had not the consent of her tutor, is valid in law, and under such marriage community of property is created. Subsequent articles or covenants of marriage executed in Lower Canada with the consent and in the presence of the tutor, acting for and in the name of his pupil and stipulating *séparation de biens* and followed by a marriage duly solemnized, can have no effect and such nullity may be opposed by the tutor himself in an action *en reddition de compte* against him by the minor separated as to property from her husband who was personally indebted to the said tutor.—Q. B.—*Languedoc & Laviolette*, 8 L. C. R., p. 257, 1 L. C. J., p. 240.

5. A judgment *en séparation de biens* can be rendered in a case between parties married in Upper Canada, where no *communauté de biens* exists, there being no marriage settlement between the parties.—Smith, J.—*Sweetapple vs Gwilt*, 13 L. C. R, p. 167, 7 L. C. J., p. 106.

6. There is no community of property, according to the custom of Paris, between parties married in England, their then domicile, without any ante-nuptial contract, who have afterwards changed their domicile and settled and died in Lower Canada.—Q. B.—*Rogers & Rogers*, 3 L. C. J., p. 64, 3 R. de L., p. 255.

Digitized by Google

7. An Indian marriage between a Christian and a woman of that nation or tribe is valid, when followed by cohabitation and repute and the bringing up of a numerous family andwill be recognized as a valid marriage by our courts and under the circumstances of this case community of property existed between the parties to such marriage, as to all property subject to such law in Lower Canada.—MONK, J.—*Connolly vs Woolrich*, 11 L. C. J., p. 197.

See also cases noted at C. C. 51 and 135.

8. *Held*, by the Superior Court that real estate acquired in this province by consorts domiciled here but who had contracted marriage in a foreign country, falls under the operation of our law governing community of property between man and wife.—*Held*, in Review, (reversing the judgment of the Superior Court :) That according to the well established jurisprudence of the Parliament of Paris, for more than two centuries before that tribunal was abolished, a community of property was held not to exist between persons who having been domiciled and having married without contract, in a place where the law of community did not exist, afterwards established their domicile and acquired property in a country where the law of community did exist ; and the same jurisprudence founded upon a doctrine approved by the most esteemed commentators on the Code Napoleon, has been invariably observed by the courts of the Province of Quebec, the law of community being considered rather as a *statut personnel* than as a *statut réel*.—C. R.—*Astill vs Hallée*, 4 Q. L. R., p. 120.

9. Community of property does not exist between two English people, married in London, England, even although they come immediately afterwards to reside in the Province of Quebec, and an action for separation as to property under these circumstances will be dismissed.—MACKAY, J.—*Dalton vs King*, 9 R. L., p. 548.

10. There is no community of property between two persons married in Chicago and an action for separation as to property taken by the wife will be dismissed.—MACKAY, J.—*Wiggins vs Morgan*, 9 R. L., p. 546.

1261. In the case of the preceding article, the community is established and governed in accordance with the rules set forth in the second chapter, and those relating to dower are laid down in the third chapter in the present title.—[II. 401.]

1262. Community of property, which the consorts are free to exclude by stipulation, may be altered or modified at pleasure, by their contract of marriage, and is called, in such case, conventional community, the principal rules concerning which are contained in the second section of the second chapter of this title.—[II. 401.]

1263. Legal or customary dower, which the parties are likewise at liberty to exclude, may also be altered or modified at pleasure, by the contract of marriage, and is called in such case, prefixed or conventional dower, the most ordinary rules concerning which are contained in the first section of the third chapter of this title.—[II. 401.]

Digitized by Google

1264. All marriage covenants must be made in notarial form, and before the solemnizing of marriage, upon which they are conditional.

Contracts of marriage made in certain localities, for which an exception has been created by special laws, are exempted from the necessity of being in notarial form. — Orléans, art. 202 ; Pothier *Mariage*, n. 48, 396 ; *Com., Int.*, nn. 11, 12 ; *Orl., Intr. tit.* 10, n. 32, 33 ; Merlin, Rép. vo. *Donation*, sec. 2, § 8, *Testament*, sec. 2, § 1, art. 4 ; C. N., 1394 ; C. S. L. C., c. 38, s. 13. [II. 401.]

DECISION : A marriage contract may, in Canada, be valid under certain circumstances, although it is not regularly executed as a notarial act, and, in fact, is no more than an *acte sous seing privé* signed by the contracting parties in the presence of a notary and left in his custody and keeping.—K. B.—*Hausseman vs Perrault*, 2 R. de L., p. 79.

✱ **1265.** After marriage, the marriage covenants contained in the contract cannot be altered [even by the mutual donation of usufruct, which is abolished ;] nor can the consorts in any other manner confer benefits *inter vivos* upon each other, except in conformity with the provisions of the act 29th Vict., ch. 17, under which a husband may, subject to the restrictions and conditions therein mentioned, insure his life for the benefit of his wife and children. — Leprestre, *Cent.* 1, c. 98 ; Louet et Brodeau, *lettre* M, c. 4 ; 4 Journ. des Aud. tit. 8, c. 30 ; Lamoignon, *Arrêtés*, tit. 32, art. 5 ; Pothier, *Mariage*, n. 48, *Com.*, intr. nn. 18, 19 ; C. N., 1395 ; Thév.-d'Ess. (Can. Ed.) 30. [II. 401.]

Amendments : The Act cited in this article as well as the Acts Q. 32 Vict., cap. 39 and 33 Vict., cap. 21 were repealed by the Act Q. 41-42, Vict., cap. 13 intituled : " An Act to consolidate and amend the law to secure to wives and children the benefit of assurance on the lives of their husbands and parents. "

Whereas it is expedient to encourage insurance on the lives of husbands and parents for the benefit of their wives and children, and to consolidate and amend the statutes relating to the same ; Therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows :

1. The act of the late province of Canada, twenty-ninth Victoria, chapter seventeen, and the acts of this province, thirty-second Victoria, chapter thirty-nine, and thirty-third Victoria, chapter twenty-one, are repealed ; except always as regards assignments made or rights accrued before, and actions and proceedings pending in any court, at the time of the coming into force of this act, with respect

Digitized by Google

to all which said assignments, rights, actions, and proceedings, the said acts shall remain in force and continue to apply.

2. It shall be lawful for any husband to insure his life for the benefit of his wife; or for the benefit of his wife and their children generally; or for the benefit of his wife and his, her and their children generally; or for the benefit of his wife and his or her children generally; or for the benefit of his wife and one or more of his, of her or of their children; and for any father or any mother to insure his or her life for the benefit of his or of her children or of one or more of them.

3. Such insurance may be effected either for the whole term of the life of the person whose life is insured, or for any definite period; and the sum insured may be made payable upon the death of such person, or upon his or her surviving a specified period not less than ten years.

4. The premium for such insurance may be payable during the whole life of the person whose life is insured, or during any period not less than ten years; and the same may be paid by yearly, half yearly, quarterly or monthly payments.

5. It shall also be lawful for any husband to appropriate any policy of insurance held by himself on his life for the benefit of his wife; or for the benefit of his wife and their children generally; or for the benefit of his wife and his, her and their children generally, or for the benefit of his wife and his or her children generally, or for the benefit of his wife and one or more of his of her or of their children; and for any father or any mother to appropriate any policy of insurance held by himself on his life, or by herself on her life, for the benefit of his or of her children, or of one or more of them.

6. Such appropriation shall be made by a declaration in writing endorsed upon, or referring and attached to the police appropriated. A duplicate of the declaration must be filed with the company which issued the policy, and a note of the filing of such duplicate must be endorsed by the company on the policy or on the declaration.

7. Such insurance may be effected and such delaration of appropriation may be made by a married woman without the authorization of her husband.

8. When the insurance is effected, or the appropriation is made for the benefit of more than one person, the husband, father or mother whose life is insured may, in the application and policy, or in the declaration of appropriation, apportion the amount of the insurance money as he or she may deem proper.

Digitized by Google

9. When no apportionment is made, the parties interested shall share the insurance money as follows: if for the benefit of a wife and the children issue of her marriage with the person whose life is insured, one half for her and the other half for their children, who will subdivide equally;—if for the benefit of a wife and her children, one half for the wife and the other half for her children, (whether issue of the same or of different marriages), who will sub-divide equally; —if for the benefit of a wife and her husband's children, one half for the wife and the other half for the children of her husband, (whether issue of the same or of different marriages,) who will sub-divide equally; if for the benefit of a wife and her husband's and her own children, one half for the wife and the other half for his children and for her children (whether issue of their or of other marriages), such children sub-dividing equally; if for the benefit of a wife and one or more children specified by name, one half for the wife and the other half for such child, or for such children, who will sub-divide equally; —if for the benefit of children only generally, equally between the chidren of the parent whose life was insured (whether issue of the same or different marriages;) and if for the benefit of several children specified by name, equally between them.

10. When any child specified by name or included generally, predeceases the person whose life is insured, the descendants of such predeceased child will take his or her share by representation.

11. When the insurance is effected or the appropriation is made without apportionment in favor of several children, whether it be jointly with a wife or in favor of children alone, if any of such children predecease the person whose life is insured, without issue, accretion takes place in favor of the surviving children. When the insurance effected or appropriation made without apportionment, is in favor of a wife and a child or children, if the wife predeceases her husband, accretion takes place in favor of the child or children; and if the child or all the children predecease the husband, accretion takes place in favor of the wife.

12. It shall nevertheless be lawful for any party who has effected an insurance or who has appropriated a policy of insurance, for the benefit of a wife or of a wife and child or children, or of a child or children only as hereinabove provided, at any time and from time to time thereafter, to revoke the benefit conferred by snch insurance or appropriation, either as to one or more or as to all of the persons intended to be benefited; and to declare in the revocation, that the policy shall be for the benefit only of the persons not excluded by the

Digitized by Google

revocation, or for the benefit of such persons not excluded jointly with another or others or entirely for the benefit of another or others not originally named or benefited. Such other or others must be a person or persons for whose benefit an insurance may be effected or appropriated under the provisions of this act.

13. Such revocation may be made either by an instrument to be attached to the policy and of which a duplicate must be filed with the company, which issued the policy and a note of the filing of such duplicate must be endorsed by the company on the policy or on the instrument retained or by will, of which, after the party's death, an authentic copy must be signified upon the company. In default of such duplicate being filed or of such copy being signified, the company will be validly discharged by paying the insurance money according to the terms and directions of the policy or of the declaration, or of a previous revocation.

14. The benefit of the policy shall revert to the insured when the child for whose benefit it was effected or appropriated or the surviving child for whose benefit solely it exists, dies without issue, before him or her; or when the wife for whose benefit solely it exists either by the policy, appropriation or revocation, or by accretion, predeceases her husband with or without issue; and the benefit of any share in an appportionment shall likewise revert to the insured when the child to whom it was apportioned, dies without issue before the insured parent, or when the wife to whom it was apportioned, predeceases her husband with or without issue.

15. When a policy reverts to the insured in whole or for a share or shares, the insured may deal with such policy or share, or shares as if the insurance had been effected and been always held for his or her own benefit.

16. The insurance effected or appropriated for the benefit of a wife, or of a wife and child or children, or of a child or children only may be made payable by the appplication and policy, or by the declaration of appropriation or by a revocation either to the party or parties benefited or to any other person or persons as trustee or trustees for the party or parties benefited.

17. When no trustee or trustees is or are appointed by the application and policy or by the declaration of appropriation or by a revocation, it shall be lawful for any person whose life is insured, by an instrument to be attached to the policy and of which a duplicate must be filed with the company which issued the policy and its filing be noted by the company upon the instrument retained, or by will, of

Digitized by Google

which (after the testator's death) an authentic copy must be signified upon the company, to appoint a person or persons as trustee or trustees for the party or parties benefited, or for any of them.

18. When the person whose life is insured, shall die without having appointed a trustee or trustees for any minor child or children benefited or for any person or persons benefited otherwise incapable of exercising his, or her, or their rights, the payment of the insurance money coming to such minor child or children or person or persons otherwise incapable of exercising his, or her, or their rights, shall be made to the executor or executors of such insured person, who shall be the trustee or trustees of such minor child or children, or person or persons otherwise incapable of exercising his, or her, or their rights. In case the trustee or trustees or the executor or executors should refuse to accept, or in case the person whose life is insured should die intestate, the payment shall be made to the tutor of such minor child or children or to the curator of such person or persons otherwise incapacable of exercising his, or her, or their rights. In case the trustee or trustees of a person or persons in the exercise of his, her, or their rights should refuse to accept, the payment shall be made to such benefited person or persons, himself, herself, or themselves.

19. The payment made to any benefited person or persons not incapable of exercising his, her or their rights, to any trustee or trustees, to any executor or executors, or to any tutor or curator, shall be a valid and sufficient discharge to the insurance company for the insurance money so paid ; and the company shall not be bound to see to the investment of the money or be liable for the subsequent misapplication thereof by any trustee or trustees, executor or executors, tutor or curator.

20. The trustee or trustees shall pay over the insurance money received for persons in the exercise of their rights to such persons at once, if no conditions have been imposed by the insured in and by the policy itself, by the declaration of appropriation or by the terms contained in a deed of revocation ; if conditions have been imposed, the trustee or trustrees shall carry out the trust and administer and pay over the insurance money in accordance with its provisions. The insurance money received by any trustee or trustees, executor or executors, tutor or curator for persons in minority or otherwise incapable of exercising their rights, shall be invested by the party or parties receiving it, in dominion or provincial stock or debentures, or in municipal stock or debentures, or on first privilege or hypothec

Digitized by Google

upon real estate with power, however, to such trustee or trustees, executor or executors, tutor or curator from time to time to alter, vary and transpose the investments held.

21. All or any part of the annual income arising from the investment of the insurance-money may be applied towards the maintenance and education of such minor child or children, or towards the maintenance of such person or persons otherwise incapacable of exercising his or her or their rights, as the trustee or trustees, executor or executors, tutor or curator may think fit; and when all the said annual income is not so applied, the surplus shall be capitalized and invested in the same manner as the insurance money received.

22. The investment shall be transferred by the trustee or trustees, executor or executors or tutor or curator; — in the case of a minor, to himself or herself when he or she attains majority, unless conditions have been imposed, in which case the investments shall only be transferred in accordance with such conditions; —and in the case of a person otherwise incapable of exercising his or her rights, to himself or herself when he or she regains their exercise, or to his, or or her heirs when he or she dies without regaining their exercise, unless conditions have been imposed, in which case they shall be carried out.

It shall, nevertheless, be lawful, should the trustee or trustees, executor or executors, or tutor think fit, to advance the insurance money, or to dispose of the investments and advance the proceeds to any minor child during his or her minority, for the establishment, advancement or preferment in the world, or for the settlement in marriage of such child.

23. If a person who has effected or appropriated an insurance for the benefit of a wife, or of a wife and child or children or of a child and children only, shall find himself or herself unable to continue to meet the premiums, it shall be lawful for him or her to surrender the policy to the company, which granted the same, and to accept, in lieu thereof, a paid-up policy for such sum as the premiums paid may represent, and for the company to accept such surrender and grant such paid-up policy, payable at the time and in the manner and for the benefit of the person or persons mentioned on the original, policy, and the share of each person, when more than one are benefited, will then be proportionately reduced.

24. Any person having effected the insurance with profits may either receive the same for his own benefit or may from time to time

Digitized by Google

either apply the same in payment or reduction of premiums, or direct them to be added to the insurance money; and the share of each person when more than one are benefited, will, in the last case, be proportionately increased. Profits accruing after a policy has been paid up, may be received by the insured, for his own benefit, or may be added to the insurance money; and the share of each person when more than one are benefited, will then also be proportionately increased.

25. It shall also be lawful for any person who has effected or appropriated an insurance for the benefit of a wife, or of a wife and child or children, or of a child or children only, and who finds himself or herself unable to continue to meet the premiums, from time to time to borrow, on the security of the policy, such sum as may be necessary to keep the policy in force; and the loans shall be evidenced by a writing, of which a duplicate must be filed with the company which issued the policy and noted by the company on the duplicate retained by the lender. Such loans shall be secured by privilege on the policy and the company shall retain a sufficient amount to pay them from the insurance money. If such loans be paid before the death of the insured, the acquittance shall be filed with the company.

26. Policies effected or appropriated for the benefit of a wife, or of a wife and child or children, or of a child or children only, shall be exempt from attachment for debts due either by the insured or by the persons benefited, and shall be unassignable by either of such parties; and the insurance-money, while in the hands of the company shall be free from and be unattachable for the debts either of the insured or of the persons benefited, and shall be paid according to the terms of such policies, or of any declaration of appropriation, or of any revocation relating to the same. Such exemption shall not apply to any policy or to any share or shares of a policy, which may have reverted to and be held by the insured.

27. The insurance money shall not be deemed to be derived from the succession of or community of property with the person whose life was insured; and its receipt by any person benefited shall not constitute an acceptance of the succession of such person, or of any community of property which existed with such person.

28. If, however, it shall be proved that all or any of the premiums were paid, at a time when the person whose life was insured was insolvent, in fraud of the rights of creditors, such creditors shall be entitled to recover and to receive out of the insurance money, an

Digitized by Google

amount equal to the premiums so paid: and in such case, the share of each person, when more than one are benefited, will be proportionately reduced.

29. Nothing contained in this act shall be held or construed to restrict or interfere with any right otherwise allowed by law to any person to effect or transfer a policy for the benefit of a wife or children; nor shall apply to insurance made in favor of or transferred to any wife under her marriage contract.—Q. 41-42 Vict., cap. 13.

DECISIONS:—1. The provisions contained in the Act 29 Vict., c. 17, whereby insurances upon the lives of husbands may be effected or indorsed in favor of their wives and children, are in the nature of *aliments*, and the insurance money due under policies made under said Act is free from the claims of the creditors of both the husband and wife.—Q. B.—*Vilbon & Marsouin*, 18 L. C. J., p. 249.

2. Lorsque dans un contrat de mariage il y a stipulation qu'il n'y aura pas de communauté de biens, que la femme aura la libre administration de ses biens, et que le mari sera seul tenu à la pension et habillement de sa femme et des frais de leur famille, la femme peut, après le décès du mari, réclamer d'un tiers détenteur cinq années et l'année courante d'arrérages de rente annuelle et viagère à elle dus sur un immeuble acquis par le mari pendant le mariage, quoiqu'elle n'ait jamais rien exigé de sa rente de son défunt mari —Q. B.—*Filion & Guénette*, 7 R. L., p. 438.

3. The husband may execute a valid hypothec in favor of his wife on his immoveable property, in lieu of a hypothec which she had by her contract of marriage to secure a sum of money brought by her at the marriage and reserved as *propre* by the contract of marriage.—The wife may legally renounce her priority of hypothec for her *reprises matrimoniales* in favor of a third party lending money to her husband on the security of the real estate, but such renunciation, when made *in favor* of a third party, does not deprive the wife of her rights against other mortgage creditors, inferior in rank to herself.—Q. B.—*Société de Construction Montarville & Cousineau*, 3 L. N., p. 329.—JETTÉ, J.—23 L. C. J., p. 276, 2 L. N., p. 308.

4. Que la saisie de biens meubles, trouvés au domicile du débiteur, ne peut être annulée par une opposition de sa femme, séparée de biens, alléguant que ces effets lui appartiennent, si la preuve établit que les dits effets, bien qu'achetés partie par le mari au nom de sa femme et partie par celle-ci, ont tous été payés des deniers du mari.—Q. B.—*Tardif & Campbell*, 12 Q. L. R., p. 330.

5. DORION, C. J., *loq.*—A married woman, separated as to property, could give to a creditor of her husband priority over her own claims on his property; but, in this case, the transaction was one prohibited between husband and wife, and, therefore, null and void. There is nothing in the law to prevent a wife from paying the debts of her husband or from disposing of her property to do so.—Q. B.—*Bank of Toronto & Perkins*, 1 Q. B. R., p. 357.

See also cases noted at C. C. 1301.

1266. Alterations made in marriage covenants, before the celebration of the marriage, must, on pain of nullity, be established by

Digitized by Google

act in notarial form, in the presence, and with the consent, of all such parties to the first contract as are interested in such alterations. —Paris, 258; Orl., 223; Brodeau sur Louet, *lettre* C, ch. 28; Pothier, *Com. Int.*, nn. 13, 14, 16; Orl. tit. 12, art. 223; Lamoignon, *Arrêtés*, tit. 32, art. 5, 6; C, N., 1396, 1397. [II. 401 to 403.]

1267. [Minors capable of contracting marriage, may validly make, in favour of their future consorts or children, all such agreements or gifts as the contract admits of, provided they are assisted by their tutors, if they have any, and by the other persons whose consent is necessary to the validity of the marriage; the benefits which they confer in such contracts upon third parties are subject to the rules which apply to minors in general.]—*ff* L. 8, *De pactis dotalibus*; L. 61, L. 73, *De jure dotium*; Brodeau sur Louet, *lettre* M. c. 9; Bacquet, *Droits de justice*, c. 21, n. 390; Pothier, *Com.*, nn. 103, 306; Orl., *Intr.* tit. 10, n. 51; C. N., 1398; Thév. d'Ess. (Can. Ed.) 31. [II. 403.]

CHAPTER SECOND.

OF COMMUNITY OF PROPERTY.

1268. There are two kinds of community of property: legal community, the rules governing which are contained in the first section of this chapter, and conventional community, the principal and most usual conditions of which are declared in the second section of the same chapter.—Pothier, *Com.*, 4, 9, 10 et seq. [II. 403.]

1269. [Community, whether legal or conventional, commences from the day the marriage is solemnized; the parties cannot stipulate that it shall commence at any other period.]— Paris, 220; Dumoulin, sur 508 Maine; Pothier, *Com.*, 4, 22, 23, 278; *Intr. tit.* 10, *Orl.* n. 32; Merlin, vo. *Communauté*, § 4, n. 1; C. N., 1399. [II. 403.]

SECTION I.—OF LEGAL COMMUNITY.

1270. Legal community is that which the law, in the absence of stipulation to the contrary, establishes between consorts, by the mere fact of their marriage, in respect of certain descriptions of property, which they are presumed to have intended to subject to it.—Pothier, *Com.*, 10. [II. 403.]

Digitized by Google

1271. Legal community may be established by the simple declaration which the parties make in the contract of their intention that it shall exist. It also takes place when no mention is made of it, when it is not expressly nor impliedly excluded, and also when there is no marriage contract. In all cases it is governed by the rules set forth in the following articles. — Pothier, *Com.*, 279 ; 3 Delvincourt, p. 9 ; C. N., 1400. [II. 403.]

DECISION :—See cases noted at C. C. 1260.

§ 1. *What things compose the assets and liabilities of the community.*

1272. The assets of the community consist :

1. Of all the moveable property which the consorts possess on the day when the marriage is solemnized, and also of all the moveable property which they acquire during marriage or which falls to them, during that period, by succession or by gift, if the donor or testator have not otherwise provided ;

2. Of all the fruits, revenues, interest, and arrears, of whatsoever nature they may be, which fall due or are received during the marriage, and arise from property which belonged to the consorts at the time of their marriage, or from property which has accrued to them during marriage, by any title whatever ;

3. Of all the immoveables they acquire during the marriage— Paris, 220 ; Lebrun, *Com.*, liv. 1, c. 5, dist., 1, nn. 1, 2, 3 ; Pothier, *Com.*, 25, 26, 100, 102, 105, 132, 204, 206, 208, 232, 264, 265-268 ; *Int. tit.* 10, Orl., 6, 7, 8, 23 ; *Puis. marit.*, 90 ; Merlin, *Com.*, § 1, n. 4, § 4, n. 2 ; 11 Pand. Franç., p. 263 et seq. ; Fenet-Pothier, p. 227-8 ; Troplong, *Mariage*, n. 605 ; C. N., 1401. [II. 405.]

DECISIONS :—1. The *communauté* enjoys the benefit of the issues and profits of the *propres* on either side, and consequently is bound to pay and discharge the *rentes* with which they are burthened during its continuance.—K. B.—*Girard vs Lemieux*, 2 R. de L., p. 78.

2. In the liquidation of the rights of husband and wife domiciliated in a township, under a judgment of *séparation de corps et de biens*, both parties being alive, real estate acquired during the marriage by purchase, and held in free and common soccage, will be considered as forming a part of the community.—C. R.—*Magreen vs Aubert*, 2 L. C. J., p. 70.

3. Qu'une femme, commune en biens, à qui son père a cédé une créance mobilière, ne peut, même avec l'autorisation de son mari, porter en son propre nom, une action pour recouvrer la créance cédée, qui appartient à la communauté. (C. C. 1292.)—Q. B.—*Bélanger & Talbot*, 3 Q. B. R., p. 317.

4. Q. B.—*Comte & Lagacé*, 3 Q. B. R., p. 319.

5. Q. B.—*Grégoire & Grégoire*, 4 Q. B. R., pp. 315, 316.

Digitized by Google

1273. All immoveables are deemed to be joint acquests of the community, if they be not proved to have belonged to one of the consorts, or to have been in his legal possession, previously to the marriage, or to have fallen to him subsequently by succession or other equivalent title.—*ff* L. 51, *De don. inter vir. et ux.;* Paris, 278; Lebrun, *Com.*, liv. 1, c. 5, dist. 3, n. 2; Bourjon, liv. 3, tit. 10, part. 2, c. 10; Pothier, *Com.*, 106, 107, 113, 121, 122, 123, 130, 203; 11 Pand. Franç., 289; C. N., 1402. [II. 405.]

DECISION:—L'immeuble acquis durant la communauté est censé l'avoir été à même l'actif de la communauté, à moins d'une preuve contraire.—Q. B.—*Mongeau & Dubuc*, 30 L. C. J., p. 25.

1274. Mines and quarries are subject as regards community, to the rules laid down concerning them, in the title *Of Usufruct, of Use and Occupation.*

The product of such mines and quarries as are opened during the marriage, upon the private property of one of the consorts, does not fall into the community; but such as were opened and worked previously to the marriage, may continue to be worked for the benefit of the community.—*ff* L. 9, *De usufructu et quemad.;* L. 7, *De soluto matrim.;* L. 18, *De fundo dotali;* Lebrun, *Com.*, liv. 1, c. 5, sec. 2, dist. 2; Pothier, *Com.*, 97, 98, 204, 207, 210, 640; *Intr.* Orl., 105, 123; 11 Pand. Franç., 290 et seq.; C. C. 460; C. N., 1403. [II. 405.]

1275. The immoveables which the consorts possess on the day when the marriage is solemnized, or which fall to them during its continuance, by succession or an equivalent title, do not enter into the community.

Nevertheless, if, after the contract of marriage in which community is stipulated, and before the marriage is solemnized, one of the consorts purchase an immoveable, the immoveable purchased in such interval, falls into the community; unless the purchase has been made in execution of some clause of the contract, in which case it is regulated according to the agreement.—*ff* L. 9, L. 73, *Pro socio;* L. 45, *De adquirendâ vel omit. hæred.;* Paris, 246; Lebrun, liv. 1, c. 4, n. 9; 2 Laurière sur Paris, 247 et seq.; Pothier, *Com.*, 140, 141, 157, 185, 197, 281, 603, 604; *Intr. tit.* 10, Orl., nn. 9, 112, Renusson, c. 3, n. 2; 3 Maleville, 191; 11 Pand. Franç., 240 et seq.; C. N., 1404. [II. 405.]

DECISION:—A donation by a father to a daughter and her husband is a *propre* and does not fall into the community of property between husband and wife.—TORRANCE, J.—*Pollico vs Elvidge*, 13 L. C. J., p. 333.

Digitized by Google

1276. Gifts by contract of marriage, those which are in contemplation of death included, gifts during marriage, and legacies, made by ascendants of one of the consorts, either to the consort entitled to inherit from them or to the other, are deemed, as regards immoveables, unless there is an express declaration to the contrary, to be made to the consort entitled to inherit, and are his private property, as being acquired under a title equivalent to succession.

The same rule applies even when the gift or the legacy, in its terms, is made to both consorts jointly.

All gifts and legacies thus made to the consorts jointly, or to one of them, by others than ascendants, come under the contrary rule, and fall into the community, unless they have been expressly excluded.—Paris, 246; Orl., 211; Pothier, *Com.*, 137, 149, 158, 168, 169, 170; 3 Maleville, 192; 11 Pand. Franç., 314 et seq.; Troplong, *Mariage*, 602-3; C. N., 1405, *contrà*; Thév.-d'Ess. (Can. Ed.) 89. [II. 405 to 407.]

DECISIONS:—1. Dans le legs d'une universalité de biens fait en faveur d'un mari et de sa femme " pour appartenir (les dits biens) à la communauté de biens " qui règne entr'eux et être considérés comme conquêts d'icelle," il y a lieu au droit d'accroissement en faveur du survivant des légataires, pour la part du prédécédé, si le prédécès a lieu du vivant du testateur.—MONK, J.—*Dupuy vs Surprenant*, 4 L. C. J., p. 128.

2. In the case of a marriage contract with a covenant of *ameublissement* and a clause of *réalisation* in the event of renunciation of the community by the wife, the wife *séparée de biens* cannot claim by way of *reprise* the enjoyment of the proceeds of the sale of an immoveable property given by the mother to her adopted daughter and her husband during the community with the condition that such property should not be seized, but would serve to procure aliments. The property given by such donation does not become a *propre* of the wife.—Q. B.—*Jarry & Trust & Loan Co.*, 11 L. C. R., p. 7.

3. Qu'un legs d'immeubles fait aux deux conjoints par mariage, par l'ascendant de l'un deux, est censé fait à l'époux successible seul, et non aux deux conjointement, à moins d'une déclaration expresse à cet effet.—Qu'un pareil legs ne donne pas lieu au droit d'accroissement en faveur de l'époux survivant, lorsque l'époux successible meurt avant le testateur, mais que dans ce cas le legs devient caduc. (C. C. 866 and 900.)—Q. B.—*Dubois & Boucher*, 3 Q. B. R., p. 241.

1277. Immoveables abandoned or ceded to one of the consorts, by his father or mother, or any other ascendant, either in satisfaction of debts due him by the latter, or subject to the payment of the debts due by the donor to strangers, do not fall into the community; saving compensation or indemnity.—Pothier, *Com.*, 130, 131, 132, 134, 136, 139, 168, 171, 172, 627; 11 Pand. Franç., 324; C. N., 1406. [II. 407.]

Digitized by Google

1278. Immoveables acquired during marriage, in exchange for others which belong to one of the consorts, do not enter into the community, and are substituted in the place and stead of the immoveables thus alienated ; saving compensation if a difference have been paid.—*ff* L. 26, L. 27, *De jure dotium* ; Lebrun, *Com.*, liv. 2, c. 5, dist. 2, n. 12 ; Pothier, *Com.*, 197 ; *Dargentré* sur *Cout. de Bretagne*, 418 ; 2 Maleville, 193 ; 11 Pand. Franç., 326 ; C. N., 1407. [II. 407.]

DECISION :—Que l'appelante, en vendant conjointement avec son mari, l'immeuble que son mari avait reçu en échange de celui qui a été affecté à son douaire, a, par là, ratifié cet échange et perdu le droit qu'elle aurait eu de récla mer son douaire sur l'immeuble donné en échange.—Q. B.—*Girouard & Fredette*, 4 Q. B. R., p. 39.

1279. A purchase made during marriage, under title of licitation, or otherwise, of a portion of an immoveable. in which one of the consorts owned an undivided share, does not constitute a joint acquest ; saving the right of the community to be indemnified for the amount withdrawn from it, to make such purchase.

Where the husband, alone and in his own individual name, acquires by purchase or by adjudication, part or the whole of an immoveable, in which the wife owned an undivided share, she has the option, at the dissolution of the community, either of abandoning the immoveable to the community, which then becomes her debtor for her share in the price, or of taking back the immoveable and refunding to the community the price of the purchase.—*ff De jure dotium* ; Pothier, *Com.*, 140, 145, 146, 150-3, 156, 629 ; 2 Maleville, 194 ; 11 Pand. Franç., 327 et seq. ; C. N., 1408. [II. 407.]

1280. The liabilities of the community consist :

1. Of all the moveable debts due by the consorts on the day when the marriage was solemnized, or by the successions which fall to them during its continuance ; saving compensation for such as are connected with immoveables which are the private property of one or other of the consorts ;

2. Of the debts, whether of capital sums, arrears, or interest, contracted by the husband during the community, or by the wife, with the consent of the husband ; saving compensation in cases where it is due ;

3. Of the arrears and interest only of such rents and debts as are personal to either of the two consorts ;

4. Of the repairs which attach to the usufruct of such immoveables as do not fall into the community ;

Digitized by Google

5. Of the maintenance of the consorts, of the education and support of the children, and of all the other charges of marriage.—Paris, 221 ; Orléans, 187 ; Lebrun, liv. 2, ch. 3 ; 2 Laurière, sur art. 221, p. 189 ; Pothier, *Com.*, 233, 237, 239, 241, 243, 247, 248, 254, 270, 271 ; Intr. tit. 10, *Orl.*, nn. 24, 25, 27, 28, 113 ; 3 Maleville, 195 ; 12 Toullier, pp. 329, 348, 354, 365 ; 11 Pand. Franç., 331 et seq. ; C. N., 1409. [II. 407.]

DECISIONS :—1. The *communauté* enjoys the benefit of the issues and profits of the *propres* on either side and consequently is bound to pay and discharge the *rentes* with which they are burthened during its continuance.—K. B.—*Girard vs Lemieux*, 2 R. de L., p. 78.

2. A judgment obtained against a married woman *commune en biens*, assisted in the suit by her husband, cannot be ground of a demand to have the said judgment declared executory against the husband. Such judgment may be invoked as an authentic acknowledgment of the debt, the action containing conclusions to the effect that the husband, as master of the community, be condemned personally to the payment of the debt.—Q. B.—*Berthelot & Turcotte*, 6 L. C. R. p. 152.

3. In an action *en séparation de corps et de biens*, a bill for medical services and attendance on the plaintiff (the wife) was properly charged among the debts due by the community.—C. R.—*Jeannot & Allard*, 6 L. C. R., p. 474.

4. The husband, where legal community exists, is not liable for debts incurred by the wife in the maintenance of a separate establishment from her husband, if she have voluntarily left his domicile without legal cause.—Short, J.—*Morkill vs Jackson*, 14 L. C. R., p. 181.

5. A claim for medical attendance, though in its nature a debt of the community, may be recovered from the personal heirs of the wife deceased, notwithstanding their renunciation of the *communauté de biens*,—Papineau, J.—*Perrault vs Etienne*, 1 L. N., p. 471.

6. The husband is liable for the debt contracted for medical services rendered to his wife even when they are separated as to property.—Johnson, J.—*D'Orsonnens vs Christin*, 7 L. N., p. 338.

7. Qu'une réclamation, quoique de sa nature dette de la communauté, peut être également exercée contre les héritiers personnels de la femme, nonobstant la renonciation par ces derniers à la communauté de biens.—Papineau, J.—*Perrault vs Etienne*, 22 L. C. J., p. 210.

1281. The community is liable for the moveable debts contracted by the wife before marriage, only in so far as they are established by an authentic act anterior to the marriage, or by an act which before that event had acquired a certain date, either by means of registration or of the death of one or more of its signers, or other sufficient proof, except in commercial matters, in which proof may be made according to the provisions of articles 1232, 1234 and 1235.

Creditors of the wife, who claim under acts the date of which

Digitized by Google

has not been established as above stated, cannot sue her for their payment, before the dissolution of the community.

The husband who claims to have paid a debt of this nature, for his wife, cannot demand repayment of it either from her or from her heirs. — Paris, 222; Pothier, *Com.*, 242, 259; Nouv. Den., *Com.*; 3 Maleville, 196; 11 Pand. Franç., 340 et seq.; 12 Toullier, 332; 3 Delvincourt, p. 14; Troplong, *Mariage*, 772-3; C. C., 1225; C. N., 1410. [II. 407 to 409]

1282. Debts due by a succession composed of moveable property only, which has fallen to the consorts during marriage, are entirely chargeable to the community.— Paris, 221; Orl. 187; Pothier, *Com.*, 211-2-3; *Success.*, c, 5, art. 2, § 2, alin. 6, 7; *Int. tit.* 17, *Orl.*, n. 112; 3 Maleville 96; 11 Pand. Franç., 345; 12 Toullier, p. 409; C. N., 1411. [II. 409.

1283. Debts due by a succession composed of immoveables only, which falls to one of the consorts during marriage, are not chargeable to the community; saving the right of the creditors to be paid out of the immoveables of the succession.

Nevertheless if such succession have fallen to the husband, the creditors have a right to be paid either out of his private property or even out of that of the community; saving, in the second case, the compensation due to the wife or her heirs.—Renusson, *Com.*, part. 1, c. 12, n. 29; Lamoignon, *Arrêtés*, tit. 32, art. 22; Pothier, *Com.*, 260, 261, 263; *Intr.*, tit. 10, *Orl.*, n. 29; 11 Pand. Franç., 345; 3 Delvincourt, p. 15; 12 Toullier, p. 411; C. N., 1412. [II. 409.]

1284. If a succession composed of immoveables only have fallen to the wife, and she have accepted it with the consent of her husband, the creditors have a right to be paid out of all the property which belongs to her; but if she have accepted it only under judicial authorization, upon the refusal of the husband, the creditors, in case the property of the succession proves insufficient, have no recourse upon her other property until the dissolution of the community.—Lebrun, *Com.*, liv. 2, c. 3, s. 2, dist. 3, n. 7, 15, 16; Chopin sur Paris, liv. 2, tit. 1, n. 15; Renusson, *Com.*, part. 1, c. 12, nn. 20, 24, 25; Pothier, *Intr.*, tit. 10, *Orl.*, n. 29; 3 Maleville, 197; 11 Pand. Franç 347; 12 Toullier, p. 412; C. N., 1413. [II. 409.]

1285. When a succession which has fallen to one of the con-

Digitized by Google

sorts consists partly of moveable property and partly of immoveables, the debts due by such succession are chargeable to the community to the extent only of the portion of the debts to the payment of which the moveable property is liable to contribute, regard being had to the value of such property as compared with that of the immoveables.

Such contributory portion is determined according to the inventory which the husband is bound to make, either in his own right, if the succession concern him personally, or as directing and authorizing the actions of his wife, if the succession be one that has fallen to her. —Lebrun, *Com.*, liv. 2, c. 3, s. 2, dist. 3, nn. 4, 6, 7, 11; Duplessis sur Paris, *Com.*, liv. 1, c. 5, sec. 3; Renusson, *Com.*, part. 1, c. 12, n. 11; Pothier, *Suc.*, c. 5, art. 2, § 2, alin. 8, *Com.* 264-267; *Intr.* tit. 10, *Ord.* nn. 29, 264; 3 Maleville, 198-9; 11 Pand. Franç., 349 et seq.; C. N., 1414. [II. 409.]

1286. In the absence of an inventory, and in all cases where the omission to make one is prejudicial to the wife, she or her heirs may, at the dissolution of the community, sue for lawful compensation, and even make proof, either by deeds and private writings, or by witnesses, and, if necessary, by general rumor, of the description and value of the moveable property not inventoried.—Blois, art. 183; Bretagne, 584; Catellan, liv. 8, c. 3; Lapeyrère, vo. *Inventaire*, 186; 3 Maleville, 190 et seq.; 11 Pand. Franç., 351; 3 Delvincourt, p. 16; 12 Toullier, p. 425; C. N., 1415. [II. 409.]

1287. The provisions of article 1285 do not deprive the creditors of a succession composed partly of moveable property and partly of immoveables of their right to be paid out of the property of the community, whether the succession has accrued to the husband, or has fallen to the wife and has been accepted by her with the consent of her husband; the whole, subject to the respective compensations.

The same rule applies if the succession have been accepted by the wife under judicial authorization only, and the moveable property belonging to it have nevertheless, been mixed up with those of the community without a previous inventory.— Lamoignon, *Arrêtés*, tit. 32, art. 22, 23; Renusson, *Com.*, part. 1, c. 12, nn. 20, 24, 25; Pothier, *Suc.*, c. 5, art. 2, § 2, alin. 6; 3 Maleville, 200; 11 Pand. Franç., 354 et seq.; 12 Toullier, p. 426; 3 Delvincourt, 16; C. N., 1416. [II. 411.]

1288. If the succession have been accepted by the wife under

Digitized by Google

judicial authorisation only, upon the refusal of the husband, and an inventory have been made, the creditors can sue for their payment, only out of the property, whether moveable or immoveable, of such succession, and, if it should prove insufficient, they must for the remainder await the dissolution of the community.—Renusson, *Com.*, part. 1, c. 12, nn. 20, 24, 25 ; Orléans, 201 ; Pothier, *Com.*, 261-2 ; *Suc.*, c. 5, art. 2, § 2, alin. 6 ; *Intr. tit.* 10 ; *Orl.*, n. 10 ; *Intr. tit.* 17, n. 112 ; Lamoignon, tit. 32, art. 24 ; 11 Pand. Franç., 354 ; 3 Delvincourt, pp. 15, 17 ; 12 Toullier, pp. 427, 431 ; C. C., 1281 ; C. N., 1417. [II. 411.]

1289. The rules established by article 1282 and the articles which follow it, govern the debts attached to a gift, as well as those which attach to a succession.—11 Pand. Franç., 355 ; 3 Delvincourt, 17 ; 12 Toullier, p. 431 ; C. N., 1418. [II. 411.]

1290. The creditors have a right to be paid the debts contracted by the wife, with the consent of the husband, either out of the property of the community, or out of that of the husband or of the wife ; saving the compensation due to the community, or the indemnity due to the husband.—Orléans, tit. 10, art. 186 ; Pothier, *Intr. tit.* 10, *Orl.*, nn. 27, 28 ; *Com.*, 248, 254 ; 3 Maleville, 201 ; 11 Pand. Franç., 355 ; 3 Delvincourt, pp. 14, 19, 22, 23 ; 12 Toullier, pp. 367, 387, 415, 421 ; C. N., 1419, 1426. [II. 411.]

DECISIONS :—1. A married woman may be sued with her husband pending the community for a debt contracted by the husband and wife jointly, and judgment obtained against her thereon.—Taschereau, J.—*Langevin vs Galarneau*, 2 R. C., p. 237.

2. During the existence of the community between husband and wife, the husband only can be sued for the debts of the community.—Polette, J.—*Frigon vs Coté*, 1 Q. L. R., p. 152.

1291. All debts which the wife contracts only in virtue of a general or special power of attorney from her husband, are chargeable to the community ; and the creditors cannot prosecute their payment either against the wife or against her personal property.—*ff Arg. ex lege* 20, *Mandati ;* Duplessis sur Paris, *Com.*, liv. 1, c. 5, sec. 1 ; 3 Maleville, 202 ; 11 Pand. Franç., 356-7 ; 3 Delvincourt, 22 ; 12 Toullier, p. 432 ; C. N., 1420. [II. 411.]

§ 2. *Of the administration of the community and of the effect of the acts of either consort, in relation to the conjugal association.*

1292. The husband alone administers the property of the com-

Digitized by Google

munity. He may sell, alienate, or hypothecate it without the concurrence of his wife.

He may even alone dispose of it, either by gift or otherwise *inter vivos*, provided it is in favor of persons who are legally capable, and without fraud.—Paris, 225, 233; Orléans, 123; Pothier, *Com.*, nn. 3, 467, 468, 471; *Puis. marit.*, 82; *Intr. tit.* 10, *Orl.*, n. 58; 3 Maleville, 202; *Contrà*, Lamoignon, tit. 32, art. 65; 11 Pand. Franç., 355, 356, 357, 358; Merlin, *Com.*, § 5, n. 5; C. N., 1421, 1422. [II. 411.]

DECISIONS:—1. The wife, during the existence of the community, cannot trouble a third party in his possession of a *propre* belonging to her and which has been alienated by her husband.—CHAGNON, J.—*Molleur vs Déjadon*, 6 R. L., p. 105.

2. See case noted at C. C. 1290.—POLETTE, J.—*Frigon vs Coté*, 1 Q. L. R., p. 152.

3. Qu'une femme, commune en biens, à qui son père a cédé une créance mobilière, ne peut, même avec l'autorisation de son mari, porter, en son propre nom, une action pour recouvrer la créance cédée, qui appartient à la commu nauté. (C. C. 1272.)—Q. B.—*Bélanger & Talbot*, 3 Q. B. R., p. 317.

4. Q. B.—*Comte & Lagacé*, 3 Q. B. R., p. 319.

5. Q. B.—*Grégoire & Grégoire*, 4 Q. B. R., p. 315 and 316.

6. Que le mari, étant le maître des actions mobilières et possessoires de la femme, l'action doit être portée par le mari seul, quand c'est une action en dommages pour injures verbales.—ANDREWS, J.—*Vermette vs Genest*, 11 Q. L. R., p. 376.

See also cases noted at C. C. 1298.

1293. One consort cannot, to the prejudice of the other, bequeath more than his share in the community.

The bequest of an object belonging to the community is subject to the rules which apply to the bequest of a thing of which the testator is only part owner.

If the thing have fallen into the share of the testator and be found in his succession the legatee has a right to the whole of it.—Paris, 296; Pothier, *Com.*, 276, 475, 479; *Intr. tit.* 10, *Orl.*, n. 158; 3 Maleville, 203; 11 Pand. Franç., 365; C. S. L. C., c. 34, s. 2, § 2; C. C., 882; C. N., 1423. [II. 411 to 413.]

DECISION:—A husband by his will left the whole of the property of the community to the plaintiff, his son, subject to the condition of paying his wife. the plaintiff's mother, a life-rent out of the proceeds of the property. The wife accepted after the death of the testator the will thus made, but afterwards gave to the plaintiff, by deed of donation, a portion of the land so divided and transferred by the will. *Held*, reversing the judgment of the Court below, that the devise by the husband of the wife's share of the community was valid against the latter, who accepted the conditions annexed to such devise.—Q. B.—*Roy & Gagnon*, 3 L. C. R., p. 145.

Digitized by Google

1294. Pecuniary condemnations, incurred by the husband for criminal offences or misdemeanors, may be recovered out of the property of the community. Those incurred by the wife can be recovered only out of her property, and after the dissolution of the community,—Louet et Brodeau, lettre C., c. 35, 52 ; 1 Journal des Aud., liv. 1, ch. 28 ; Leprestre, *cent.* 2, ch. 98 ; Lebrun, *Com.*, liv. 2, c. 2, sec. 3 ; Renusson, *Com.*, part. 1, c. 6, nn. 46, 51 ; Pothier, *Com.*, 248, 249, 257 ; *Puis. mar.*, 56, 66 ; Orléans, 200, 3 Maleville, 202-3-4 ; 12 Toullier, nn. 221-2 ; 11 Pand. Franç., 365 ; Troplong, *Mariage*, 915 ; C. N., 1424. [II. 413.]

DECISIONS :—1. Though a husband is not responsible in damages for the *délit* of his wife *commune en biens* with him unless he has personally participated in the *délit*, yet if he joins with her in a defence to the action, and the defence is overruled, he will be condemned jointly and severally with her.—TORRANCE, J.—*Rocheleau vs Rocheleau*, 14 L. C. J., p. 194.

2. In an action taken against a married woman for damages caused by personal injuries, the husband was joined with her in the suit. The proof was conclusive against the wife, but it was also proved that the husband did not participate in the offence. The husband not having contested the action so far as he was concerned, the Court condemned the wife alone to $10 damages, which condemnation could only be executed upon the personal property of the wife after the dissolution of the community.—TESSIER, J.—*Bonneau vs Laterreur*, 1 Q. L. R., p. 351.

3. To an action of damages brought by the plaintiff, personally as well as being head of the community, alleging that the defendant had slandered plaintiff's wife, the defendant pleaded in compensation that the plaintiff's wife had slandered defendant, without specifying the occasion or alleging that the plaintiff was present or had approved of the words uttered.—*Held* :—That the plaintiff, not being responsible for slander committed by his wife without his knowledge or approval, such slander could not be pleaded in compensation. (C. C. 1190.)—LORANGER, J.—*Lavallée vs Surprenant*, 10 L. N., p. 313.

1295. The criminal condemnation of one of the consorts which causes civil death, affects only his share in the community and his private property.—Papon, liv. 5, tit. 10, n. 7 ; Louet et Brodeau, lettre C, c. 35, 52 ; Pothier, *Com.*, 249, 474 ; 11 Pand. Franç., 368 ; 12 Toullier, pp. 250 et seq., 223 et seq. ; C. N., 1425. [II. 413.]

1296. Acts done by the wife without the consent of her husband, even when she is judicially authorized, do not affect the property of the community beyond the amount of the benefit it derives from them, unless she contracts as a public trader, and for the purposes of her trade.—Paris, 234, 236 ; Pothier *Com.*, 255-6-7, 500, *Puis. mar.*, 13 ; *Intr. tit.* 10, *Orl.*, n. 201 ; C. N., 1426. [II. 413.]

Digitized by Google

DECISIONS:—1. The defendant cohabited for many years with a woman, whom he held out to the world as his wife, and in a deed of lease he described himself and her as *communs en biens*. The woman carried on business as a milliner, and the defendant, her husband, as a repairer of hats in the same premises, but all the receipts of both went into the millinery account. He also ordered goods and made payments in her name. After her decease, the plaintiff's creditors, having subjected his estate to compulsory liquidation for a debt of the community, the defendant alleged *inter alia*, that he was not married to the woman, and, therefore, not liable for her debts. *Held*, that under the circumstances, the defendant was liable for the debts of the deceased, whether married or not married, inasmuch as he had held her out to the world as his wife, and she was presumed to act for him.—Q. B.—*Morgan & Gauvreau*, 2 L. C. L J., p., 248.

2. Qu'une femme, commune en biens et sous puissance de mari, ne peut valablement faire assurer les meubles de son ménage, sans l'autorisation de son mari ; et le fait de n'avoir pas ainsi declaré son état à la compagnie d'assurance rend nulle la police d'assurance. (C. C. 183 et 2571.) — TASCHEREAU, J.—*Rousseau vs Royal Insurance Co.*, M. L. R., 1 S. C. p· 395.

1297. [A wife cannot, without judicial authorization, obligate herself nor bind the property of the community, even for the purpose of releasing her husband from prison, or of establishing their common children, in the case of his absence.]—Pothier; *Puis. mar.*, nn. 35, 41; C. N., 1427. [II. 413.]

DECISIONS:—1. A husband and wife *communs en biens* undertook by notarial obligation to pay the plaintiff a sum of money acknowledged to have been lent and advanced "to them" without any expression of *solidarité* and, to secure the payment of the debt, a mortgage was given upon certain real estate, a *propre* of the wife. *Held*, in an action against the husband and wife, that, the wife having subsequently obtained a separation of property from her husband and duly executed the judgment, she had become free from her obligation and the land discharged from the mortgage by reason of such judgment and of the clause of the Registry Ordinance 4 Vict. cap 30, sec. 36.—BERTHELOT, J,—*Byrnes vs Trudeau*, 14 L. C. R., p. 17.

2. La femme mariée et commune en biens ne peut être autorisée en justice à retirer des deniers qui sont le produit de meubles qui lui sont réservés propres par son contrat de mariage, ou qui sont les biens de la communauté.—BÉLANGER, J.—*Demers vs Foubert*, 6 R. L., p. 98.

See also cases noted at C. C. 1301 and 1444.

1298. The husband has the administration of all the private property of his wife.

He may exercise, alone, all the moveable and possessory actions which belong to his wife,

He cannot, without her consent, dispose of the immoveables which belong to her.

He is responsible for all deteriorations which his wife's private

Digitized by Google

property may suffer for want of conservatory acts.—Paris, 226, 228, 233; Orléans, 195; Coquille, *Quest.*, 107; Lamoignon, tit. 32, art. 67, 68; Pothier, *Puis. marit.*, 84, 91, 96, *Com.*, 253, 473; *Int. tit.* 10, *Orl.*, 114, 153, 157; 11 Pand. Franç., 371; C. N., 1428. [II. 413.]

DECISIONS :—1. The husband and wife, common as to property, may sue together for a debt due the community.—MEREDITH, C.J.—*Bertrand vs Pouliot* 4 Q. L. R., p. 8.

2. Que la vente par le mari des biens personnels de la femme, sans son consentement, constitue une nullité de droit.—Q. B.—*Archambault & Blumhart*, 30 L. C. J., p. 51.

3. That the condition annexed to a bequest of money to a married women, *commune en biens*, that it shall not be subject to the control of her husband and shall be for aliment, and not subject to seizure, is valid, and an action by the husband in respect of such money will not be maintained.—TORRANCE, J.—*Minto vs Foster*, M. L. R., 1 S. C., p. 472.

4. A married women authorised by her husband can bring an action for damages in her own name for personal wrongs.—Q. B.—*Waldron & White*, 11 L. N. p. 53, M. L. R., 3 Q. B., p. 375.

5. Que dans une action en dommages pour torts corporels à une femme mariée sous le régime de la communauté la femme et son mari peuvent tous deux être demandeurs dans la cause en leur qualité de communs en biens; et le fait que les conclusions demandent que la somme réclamée soit payée à la femme est indifférent.—JETTÉ, J.—*Gaynon vs Corp. du Village de St. Gabriel*, M. L. R., 3 S. C., p. 97.

6. Qu'une dette de la communauté entre mari et femme, ne peut, pendant l'existence de la communauté, être poursuivie contre la femme seule, même avec la mise en cause de son mari, pour l'assister, mais qu'elle doit l'être contre le mari seul.—Q. B.—*Duval & Anctil*, 16 R. L., p. 328, 14 Q. L. R., p. 244.

See also cases noted at C. C. 1292.

1299. Leases of the wife's property, made by her husband alone, cannot exceed nine years; she is not bound, after the dissolution of the community, to maintain those which have been made for a longer term.—Paris, 227; Lamoignon, tit. 32, art. 69; Pothier, *Puis. marit.*, 92, 93, 94, 95; *Intr. tit.*, 10, *Orl.*, n. 156, *Louage*, n. 44; 2 Maleville, 206; 12 Pand. Franç., 375 et seq.; Merlin, Rép., vo. *Communauté*, § 3, n. 6; 2 Toullier, pp. 580, 588; C. N., 1429. [II. 413.]

1300. Leases of property of the wife for nine years or for a shorter term, which have been made or renewed by the husband alone more than a year in advance of the expiration of the pending lease, do not bind the wife, unless they come into operation before the dissolution of the community.—Arrêt Parl. Paris, 26 fév. 1672; Louet et Brodeau, lettre B, c. 5; Pothier, *Louage*, n. 44, *Puis. marit.*, 94; *Intr. tit.* 10, *Orl.*, n. 156; Lamoignon, tit. 32, art. 70; 11 Pand. Franç., 380; 12 Toullier, p. 588; C. N., 1430. [II. 415.]

Digitized by Google

1301. A wife cannot bind herself either with or for her husband, otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect.—C. S. L. C., c. 37, sec. 55; C. N., 1431. [II. 415.]

DECISIONS:—1. The wife who undertakes with her husband, such husband being a trader, becomes the *caution solidaire* of a trader, in so far as such undertaking concerns his trade, and without the necessity that the instrument by which she so binds herself should express the *solidarité* or the fact that she is authorized by her husband.—K. B.—*Pozer & Green*, 1 R. de L., p. 186.

2. A married woman can oblige herself with her husband only as *commune en biens* and in the case submitted a suretyship entered into by a married woman jointly with her husband for a third party is null and void under the provisions of the Act 4 Vict., c. 30, s. 36.—Q. B.—*Jodoin & Dufresne*, 3 L. C. R., p. 189.

3. The promissory note of a married woman separated as to property from her husband, given for provisions necessarily used in the family, in favor of her husband and by him endorsed, is valid without proof of express authority to her to sign the same.—BADGLEY, J.—*Cholet vs Duplessis*, 12 L. C. R., p. 303.

4. A wife *séparée de biens*, from her husband cannot bind her real estate for a debt due by her husband for the payment of which she could not be bound herself personally.—Q. B.—*Little & Diganard*, 12 L. C. R., p. 178.

5. A husband and wife *commune en biens* undertook by notarial obligation to pay the plaintiff a sum of money acknowledged to have been lent and advanced "to them," without any expression of *solidarité* and, to secure the payment of the debt, a mortgage was given upon certain real estate, a *propre* of the wife. *Held*, in an action against husband and wife, that the wife having subsequently obtained a separation as to property from her husband and duly executed the judgment, she had became free from her obligation and the land discharged from the mortgage by reason of such judgment and of the clause of the Registration Ordinance 4 Vict., c. 30, s. 36.—BERTHELOT, J.—*Byrnes vs Trudeau*, 14 L. C. R. p. 17.

6. Un billet promissoire d'une femme séparée de biens, signé conjointement et solidairement avec son mari dans le but de se rendre caution pour lui est nul quant à elle, en vertu de la section 36 de l'ordonnance des hypothèques, 4 Vict. c. 30.—*Semble*:—Que si elle était marchande publique, et si la dette avait été contractée pour le fait de son commerce, elle serait obligée au paiement quoique le mari l'eût contractée et que la femme fût séparée de biens.—BADGLEY, J.—*Shearer vs Compain*, 5 L. C. J., p. 47.

7. La 4ème Vict., ch. 30 sec. 36 statuant que "nulle femme mariée ne "pourra se porter caution, ni encourir de responsabilité en aucune autre qualité "que comme commune en biens avec son mari, pour les dettes, obligations ou enga- "gements contractes par le mari avant leur mariage, ou pendant la durée du ma- "riage, et tous engagements et obligations contractés par une femme mariée, en "violation de cette disposition, seront absolument nuls et de nul effet;"—tout en rendant nuls les engagements de la femme pour son mari, au point de la soustraire à toute action résultant de tels engagements, ne l'empêche pas néanmoins de renoncer à l'exercice de ses droits hypothécaires, pour reprises matrimoniales, sur les biens aliénés par son mari.—La renonciation de la femme à l'exercice de tels droits n'a pas besoin d'être stipulée, et elle peut être inférée du fait qu'elle

Digitized by Google

ratifie et garantit l'aliénation faite par son mari.—Q. B.—*Boudria & McLean*, 6 L. C. J., p. 65.

8. La renonciation de la femme à l'exercice de ses droits et reprises, en faveur d'un créancier de son mari, n'est pas un cautionnement, et en conséquence, telle renonciation est valable.—SMITH, J.—*Armstrong vs Rolston*, 9 L. C. J., p. 16.

9. La 4éme Vict., chap, 30, sect. 36, tout en rendant nuls les engagements de la femme pour son mari au point de la soustraire à toute action résultant de tels engagements, ne l'empêche pas néanmoins de renoncer à l'exercice de ses droits hypothécaires pour reprises matrimoniales sur les biens aliénés par son mari.—Q. B.—*De La Gorgendière & Thibaudeau*, 2 Q. L. R., p. 163.

10. A *propre ameubli* of the wife may, during the community, be effectually hypothecated by the husband, and the wife, even if she have the *clause de reprises* in her favour and although she may renounce the community, cannot defeat such mortgage. A married woman can legally renounce, in favor of a creditor of her husband, her hypothecary rights on the property of her husband and of the community; and this notwithstanding the provision of the Registry Ordinance declaring that "no married woman shall become security, or incur any liability, "other than as *commune en biens* with her husband, for debts or obligations "entered into by her husband before their marriage, or which may be entered "into by her husband during their marriage."—The question whether, notwithstanding the Registry Ordinance, a married woman could legally become jointly bound with her husband for the debt of a third person considered and observations in the three Courts (Superior Court, Court of Queen's Bench and the Privy Council), respecting the case of Jodoin and Dufresne (above cited.)—PRIVY COUNCIL.—*Hamel & Panet*, 2 App. Cas, p. 121, 3 Q. L. R., p. 173.—Q. B.—Q. L. R., *loc. cit.*

11. Although, under the provisions of theR egistry Ordinance, reproduced by article 1301 of the Civil Code, a wife cannot bind herself with or for her husband otherwise than as being common as to property, she may nevertheless legally renounce her hypothecary right upon the property of her husband in favor of a creditor of her husband.—MEREDITH, C. J.—*Thibaudeau vs Perrault*, 3 Q. L. R., p. 71.

12. Both husband and wife *séparés de biens* are jointly and severally liable for a joint note made in the course of a business in which they were both jointly interested.—MONK, J.—*Girouard vs Lachapelle*, 7 L. C. J., p. 289.

13. Un mari et une femme séparés de biens sont conjointement et solidairement tenus au paiement de choses nécessaires à la vie, bien qu'elles aient été achetées pendant la communauté.—SMITH, J.—*Paquette vs Limoges*, 7 L. C. J., p. 30.

14. Dans l'espèce actuelle, la vente faite au défendeur, par la demanderesse séparée de biens, de certains immeubles qui lui sont propres, doit être rescindée sur le principe qu'aucune valeur n'a été prouvée lui avoir été payée.—De plus, (par la cour inférieure,) les engagements contractés à cette vente par la demanderesse, l'ayant été pour les dettes de son mari, sont nuls en vertu de la 55e section du ch. 37 des S. R. B. C.—C. R.—*Walker vs Crébassa*, 9 L. C. J., p. 53.

15. By the effect of a judgment of *séparation de biens* duly executed, the wife is exempted from any liability by her previously incurred as security, (*caution*,) for her husband.—BADGLEY, J.—*Plessis vs Dubé*, 9 L. C. J., p. 76.

16. La femme mariée et séparée de biens ne peut s'engager en aucune

Digitized by Google

manière pour les affaires de son mari, et si elle le fait, son engagement sera cassé et annulé comme fait en fraude et en violation des lois d'ordre public.—Pour savoir si l'obligation contractée au nom de la femme seule, l'a été pour les affaires de son mari, il convient de s'enquérir de toutes les circonstances dans lesquelles l'obligation a été contractée et avoir égard aux présomptions qui découlent des faits prouvés.—Dans l'espèce, bien que l'obligation a été contractée par la défenderesse seule, en faveur de la demanderesse, il résulte des faits prouvés que la demanderesse a contracté avec le mari de la défenderesse et que cette dernière a consenti une obligation hypothécaire en faveur de la demanderesse pour compléter et assurer les transactions de son mari.—SICOTTE, J.—*Société de Construction de St. Hyacinthe vs Brunelle*, 1 R. L., p. 557.

17. A deed of sale made by a wife *commune en biens* to a third party of her *propre* for a pretended consideration of $400, when the real consideration was a lease of moveables by the third party to her husband, will be set aside as a contravention of C. C. 1301.—C. R.—*Bélanger vs Brown*, 14 L. C. J., p. 259.

18. Une dette payée par une femme commune en biens avec son mari, est payée pour le compte de la communauté, qui en devient créancière, si c'était la dette d'un tiers.—Q. B.—*Gaudry & Bergevin*, 2 R. L., p. 115.

19. La femme séparée de biens peut s'obliger conjointement et solidairement avec son mari, et son obligation sera jugée valable, s'il est prouvé qu'elle a profité de la transaction.—Pour se faire relever de son obligation, elle doit prouver que le créancier savait, au moment du contrat, qu'elle ne s'obligeait que comme caution de son mari.—Q. B.—*Malhiot vs Brunelle*, 15 L. C. J., p. 197.

20. La femme séparée de biens, qui s'étant rendue caution pour son mari, acquitte son cautionnement, a droit de répéter ce qu'elle a ainsi payé.—Q. B.—*Buckley & Brunelle*, 21 L. C. J., p. 133.

21. A married woman borrowed money upon an obligation to which her husband was a party as her surety. She pleaded on an action brought to recover the money, that she had passed the obligation as *séparée de biens* from her husband, but that the latter had used the money borrowed to pay his own debts. *Held:* (reversing the judgment of PLAMONDON, J.) that upon the evidence adduced it was not proved that the loan was not made in violation of C. C. 1301.—Q. B.—8 R. L., p. 138.

22. An obligation made by a wife to repay money advanced for her husband's use is an absolute nullity, and even a representation by the wife to the lender that the money was for herself, does not affect the case.—JOHNSON, J.—*Rhéaume vs Caille*, 1 L. N., p. 340.

23. That the endorsement *pour aval* of a wife *séparée quant aux biens* from her husband, on a promissory note signed by him for goods sold and delivered to him and charged to him alone in the vendors books, and given in renewal of a note of the husband, not bearing her endorsement, is null and void notwithstanding that the goods so sold and delivered may have contributed to the support of the wife (C. C. 1453).—Q. B.—*Bruneau & Barnes*, 25 L. C. J., p. 245, 3 L. N., p. 301.

24. DORION, C. J. *loq.*—A married woman, separate as to property could give to a creditor of her husband priority over her own claims on his property, but, in this case, the transaction was one prohibited by law between the husband and wife, and therefore null and void. There is nothing in the law to prevent a wife from paying the debts of her husband or from disposing of her property to do so. (C. C. 1265.)—Q. B.—*Bank of Toronto & Perkins*, 1 Q. B. R., p. 357.

Digitized by Google

25. A transfer of a claim or of money made by a wife, ***séparée de biens*** to a creditor of her husband, in payment or part payment of her husband's debt, is valid and the wife is not entitled to have such transfer or payment set aside.—C. R.—*Gorrie vs Ogilvie*, 5 L. N., p. 261.—TORRANCE, J.—4 L. N., p. 228.

26. Que la femme mariée sous le régime d'exclusion de communauté, peut emprunter, avec l'autorisation de son mari, et que l'obligation qu'elle contracte pour le capital et les intérêts n'est pas prohibée par l'article 1301 C. C.—Q. B.—*Ross & Société de Construction Permanente de Québec*, 12 R. L., p. 130.

27. Que l'obligation consentie par une femme mariée et commune en biens, conjointement avec son mari, et par laquelle la femme hypothèque un immeuble à elle propre, est nulle, s'il n'est pas prouvé que la femme a employé les deniers empruntés à l'amélioration de son propre.—MATHIEU, J.—*Rabeau vs Leroux*, 13 R. L., p. 378.

28. Que la femme qui fait un emprunt et qui contracte une obligation en son nom personnel, sera déchargée de l'obligation par elle consentie, s'il est prouvé que l'emprunt a été fait pour les affaires du mari et que le prêteur a eu connaissance de l'objet de l'emprunt.—MATHIEU, J.—*Pariseau vs Trudeau*, 13 R. L., p. 593.

29. Qu'une femme séparée de biens et marchande publique, n'a pas le droit d'endosser un billet reçu dans son commerce, et de le transporter comme sûreté collatérale à un créancier de son mari; ce billet ne pourra servir de base en loi à aucun recours du créancier contre la femme.—TASCHEREAU, J.—*Martin vs Guyot*, M. L. R., 1 S. C., p. 181.

30. A wife ***commune en biens*** with her husband, may during his life time validly renounce to a right of usufruct reserved to her, in the event of her surviving her husband, on property possessed by him, subject to a substitution in favor of her children. The fact that, on her husband's death, she renounced to the community, will not affect the validity of such renunciation, which does not come within the prohibition of C. C. 1301.—Q. B.—*Langlais & Langlais*, 9 L. N., p. 90.

31. Where a married woman sold certain of her immoveable property and thought that she was merely mortgaging it, there being ***droit de réméré*** in the deed of sale, and she proved that, to the knowledge of the purchaser, it was to pay her husband's debts that the deed was passed, the Court annulled the transaction for all such amounts as it was proved the alleged purchasers knew were used to pay the debts of the seller's husband.—Q. B.—*Ritchie & Klock*, 31 L. C. J. p 29.

Confirmed in the SUPREME COURT, 11 L. N., p. 152.

32. Que l'obligation d'une femme séparée de biens contractée conjointement et solidairement avec son mari est nulle comme étant en contravention à 1301 C. C.—C. R.—*Chapdelaine vs Vallée*, 16 R. L., p. 51.—M. L. R., 3 S. C., p. 380.

See also cases noted at C. C. 1265.

1302. A husband who contracts obligations for the individual affairs of his wife, has a recourse against her property in order to obtain the reimbursement of what he is obliged to pay by reason of such obligations. — 3 Maleville, 206; 11 Pand. Franç., 382; C. N., 1432. [II. 415.]

Digitized by Google

1303. If an immoveable or other object belonging exclusively to one of the consorts be sold, and the price of it be paid into the community and be not invested in replacement, or if the community receive any other thing which belongs exclusively to one of the consorts, such consort has a right to pretake such price or the value of the thing which has thus fallen into the community.—Paris, 232; Pothier. *Com.*, 497, 583, 593, 607, 608; *Intr. tit.* 10, *Orl.*, n. 192; C. N., 1433. [II. 415.]

DECISION :—Que, dans l'espèce, les impenses faites sur les propres de la femme doivent être déduites sur sa part de la communauté.—Q. B.—*Taché & Taché*, 12 Q. L. R., p. 45, 9 L. N., p. 338.

1304. If, on the contrary, moneys have been withdrawn from the community and have heen used to improve or to free from incumbrance an immoveable belonging to one of the consorts, or have been applied to the payment of his individual debts, or for his exclusive benefit, the other consort has a right to pretake by way of compensation, out of the property of the community, a sum equal to the moneys thus appropriated.— Paris 232; Orléans, 100; Pothier, *Com.*, 197, 585, 593, 607, 608, 594-5-7-8; 3 Maleville, 207-8; 11 Pand. Franç., 383; C. N., 1433. [II. 415.]

DECISION—Un jugement en séparation de biens, qui détermine les reprises matrimoniales de la femme, n'est qu'un jugement d'expédience, que les tiers peuvent attaquer. La saisie-arrêt, entre les mains de la femme séparée, est une voie régulière de faire rendre à la femme ce qu'un tel jugement lui accorde illégalement. Une expertise n'est pas nécessaire pour constater ce que la femme reçoit illégalement par un tel jugement, quand la preuve est faite autrement d'une manière suffisante.—MONK, J.—*Doutre vs Trudeau*, 8 L. C. J.. p. 135.

1305. The replacement is perfect as regards the husband, whenever, at the time, he declares that he makes the purchase with moneys arising from the alienation of an immoveable which belonged to himself alone, or for the purpose of replacing such immoveable. Lebrun, *Com.*, liv. 3, c. 2, sec. 1, dist. 2, nn. 69, 70; Pothier, *Com.*, 198; 11 Pand. Franç. 387, 388; 11 Toullier, p. 515; C. N., 1434. [II. 415.]

1306. The declaration of the husband, that the purchase is made with moneys arising from an immoveable sold by his wife and for the purpose of replacing it, is not sufficient, if such replacement have not been formally accepted by the wife, either by the deed of purchase itself, or by some other subsequent act made before the dissolutiou of the community. — Cod., L. 12, *De jure dotium*; Lebrun,

Digitized by Google

Com., liv. 1, c. 5, dist. 3, n. 8, liv. 3, sec. 1, dist. 2, n. 72; Pothier, *Com.*, 199, 200; 3 Malleville, 208; 11 Pand. Franç., 389 et seq.; 3 Delvincourt, 17; 12 Toullier, pp. 516, 536; C. N., 1435. [II. 415.]

DECISION:—Que la déclaration d'emploi ne peut être faite que par l'acte d'acquisition même.—Que cette déclaration faite *ex intervallo* ne peut faire sortir de la communauté le bien que l'acquisition y a mis, et que si elle transmet un propre, elle est une vente entre mari et femme que la loi prohibe et qu'elle fait nulle.—CASAULT, J.—*Ross vs Têtu*, 6 Q. L. R., p. 254.

1307. The compensation for the price of an immoveable belonging to the husband can be claimed only out of the mass of the community; that for the price of an immoveable belonging to the wife, may be claimed out of the private property of the husband, if the property of the community prove insufficient.

In all cases, such compensation consists in the price brought by the sale and not in the real or conventional value of the immoveable sold.—Paris, 232; Lebrun, *Com.*, liv. 3, c. 2, sec. 1, dist. 2; Pothier, *Com.*, 586, 588, 610; *Int. tit.* 10, *Orl.*, nn. 100, 101; 11 Pand. Franç., 393; C. N., 1436. [II. 415.]

1308. If the consorts have jointly benefited their common child without mentioning the proportion in which they each intended to contribute, they are deemed to have intended to contribute equally, whether such benefit has been furnished or promised out of the effects of the community, or out of the private property of one of the consorts; in the latter case, such consort has a right to be indemnified out of the property of the other, for one half of what he has so furnished, regard being had to the value which the object given had at the time of the gift.—Lebrun, *Com.*, liv. 3, c. 2, sec. 1, dist. 6; Renusson, *Com.*, part. 2, c. 3, n. 15; Pothier, *Com.*, 649, 655, *Succ.*, c. 4, art. 2, § 5; *Intr. tit.* 10, *Orl.*, nn. 85, 86, 131; 11 Pand. Franç., 401-2; 12 Toullier, pp. 486, 497; C. N., 1438. [II. 416.]

DECISION:—A wife who with her husband makes a donation of a sum of money to one of their children, whilst *en communauté* with her husband, remains liable for one half of the donation, notwithstanding she be subsequently separated judicially from her husband as to property and renounce to the community.—JOHNSON, J.—*Vincent vs Benoit*, 21 L. C. J., p. 218.

1309. Any benefit conferred by the husband alone upon a common child is chargeable to the community, and if the wife accept the community she bears one half, unless the husband has declared expressly that he charged himself with the whole or with with more than the half of such benefit.—Renusson, *Com.*, part. 1, c. 6, n. 12, c.

Digitized by Google

13, n. 15; 2 Argou, liv. 3, c. 8; Pothier, *Com.*, 647, 648, 656, 657, *Suc.*, c. 4, art. 2, § 5; *Intr. tit.* 10, *Orl.*, n. 87; 3 Maleville, 212; 11 Pand. Franç., 402; C. N., 1439. [II. 416.]

§ 3. *Of the dissolution of the community and of its continuation in certain cases.*

I. *Of the dissolution of the community.*

1310. The community is dissolved: 1. By natural death; 2. By civil death; 3. By separation from bed and board; 4. By separation of property; 5. By the absence of one of the consorts, in the cases and within the restrictions set forth in articles 109 and 110.—*ff* L. 59, L. 63, *Pro socio*, § *in hæred.*; Pocquet, *Com.*, règle XL, p. 382; Pothier, *Com.*, 503-4-6, *Mariage*, 522; *Intr. tit.* 10, *Orl.* nn. 87, 88; 3 Toulllier, pp. 23, 24; C. C., 109, 110. [II. 417.]

DECISION:—Si la femme n'a pas considéré sa communauté dissoute par la mort civile de son mari, dans les rapports subséquents qui ont eu lieu entre eux sur leurs droits, la cour n'en peut pas prendre connaissance.—C. R.—*Cartier vs Béchard*, 1 L. C. J., p. 44.

1311. Separation of property can only be obtained judicially, before the court of the domicile, when the interests of the wife are imperiled and the disordered state of the husband's affairs gives reason to fear that his property will not be sufficient to satisfy what the wife has a right to receive or to get back.

All voluntary separations are null.—Cod., L 29, L. 50, *De jure dotium*; Novelle 97. c. 6; Lamoignon, tit. 32, art. 85; Pothier, *Com.*, 510-2-4-7; *Intr. tit.* 10, *Orl.*, n. 89; 3 Maleville, 214; 11 Pand Franç., 212; Merlin, Rép., vo. *Séparation de biens*, sec. 2, § 2, n. 8; C. N., 1443. [II. 417.]

DECISIONS:—1. A wife, in case of her husband's insolvency, cannot sue by her tutor for what she brought in marriage. Her remedy is an action *en séparation de biens* in her own name.—K. B.—*Melvin vs Ireland*, 1 R. de L., p. 350.

2. In an action by a wife against her husband *en séparation de biens* there was error in the judgment of the Court below in taking as confessed interrogatories upon articulated facts served on the husband, the *avcu* or consent being inadmissible.—Q. B.—*Maloney & Quinn*, 10 L. C. R., p. 454.

3. Although there is no community of property, according to the Custom of Paris, between parties married in Upper Canada, their then domicile, without any ante-nuptial contract, yet, an action *en séparation de biens* will be maintained in favor of the wife, by reason of the insolvency of the husband, since their removal to Lower Canada.—SMITH, J.—*Sweetapple vs Gwilt*, 7 L. C. J. p. 106, 13 L. C. R., p. 167.

Digitized by Google

4. Le jugement en séparation de biens obtenu dans un district autre que celui du domicile du mari, est d'une nullité radicale et absolue, et n'a pu avoir l'effet légal de dissoudre la communauté de biens existant entre les conjoints, —CHAGNON, J —*Molleur & Dejadon*, 6 R. L., p. 105.

5. Qu'une séparation de biens entre mari et femme obtenue devant les tribunaux de France, vaut ici, comme si elle eût été obtenue devant nos tribunaux. MATHIEU, J.—*Goudron vs Lemonier*, M. L. R., 1 S. C., p. 160.

6. Que l'interdiction du mari pour démence ne donne pas à sa femme le droit d'obtenir la séparation de biens.—STUART, J.—*Paradis vs Laflamme*, 8 Q. L. R., p. 307.

1312. Separation of property, although judicially ordered, has no effect, so long as it has not been carried into excution, either by the actual payment, established by an authentic act, of what the wife has a right to receive or to get back, or at least by proceedings instituted for the purposes of obtaining such payment.—Pothier, *Com.*, 518, 523, *Puis. marit.*, 18; *Orléans*, art. 198, note 5; Lacombe, vo. *Séparation*, n. 6, p. 639; Lamoignon, tit. 32, art. 85; 2 Pigeau, 195 et seq.; Merlin, Rép., vo. *Séparation des biens*, sec. 2, § 3, art. 2, n. 6; C, N., 1444. [II. 417.]

DECISIONS:—1. La renonciation à la communauté dûment insinuée, est une exécution valable de la sentence en séparation de biens.—C. R.—*Senécal vs Labelle*, 1 L. C. J., p. 273.

2. Lorsqu'un jugement en séparation de biens est rendu en faveur de la femme et que cette dernière accepte la communauté, ce jugement peut être exécuté volontairement par les parties, sans qu'il soit besoin de la nomination d'un praticien pour procéder à l'inventaire.—En ce cas, et aussitôt que fidèle inventaire aura été fait des biens de la communauté, le jugement de séparation sera valablement exécuté, par le paiement réel fait à la femme, de sa part en la communauté, telle que constatée par acte authentique du partage des biens qui la composaient. Cet acte de partage, sur motion à cet effet, pourra être homologué par la cour.—TORRANCE, J.—*Holland & Caughlan*, 16 L. C. J., p. 105.

3. Qu'une femme qui poursuit en séparation de biens peut, avant jugement, déclarer qu'elle n'a aucune reprise matrimoniale à exercer, et qu'elle entend renoncer à la communauté.—JETTÉ, J.—*Deschamps vs Charbonneau*, 11 R. L., p. 556.

1313. [Every judgment ordering separation of property must be inscribed, without delay, by the prothonotary of the court which rendered the judgment, upon a list kept for that purpose and posted in his office; and such inscription and the date thereof must be mentioned at the end of such judgment, in the register in which it is recorded.

The separation affects third parties, from the day only when these formalities have been complied with.]

Digitized by Google

Special formalities are necessary in order to obtain judgments of separation of property against traders, as provided in *The Insolvent Act*, 1864.—Orléans, 198 ; Ord. 1673, tit. 8, art. 1, 2 ; Pothier, *Com.*, 517, 521 ; 2 Pigeau, 195 ; C. C. 333 ; 2 Maleville, 215 ; 11 Pand. Franç., 415 ; C. N., 1445. [II. 417, III. 383.]

Amendment :—The Insolvent Act of 1864 was repealed by the Act intituled " An act respecting Insolvency."—D. 32-33 Vict., cap. 16, sec. 154.

The Act intituled " An Act respecting Insolvency," known as the Insolvent Act of 1875, and its amending acts, were repealed by the Act intituled " An Act to repeal the Acts respecting Insolvency now in force in Canada."—D. 43 Vict., cap. 1.

DECISION :—Que la femme qui poursuit en séparation de biens peut, avant jugement, déclarer qu'elle n'a aucune reprise à exercer contre le défendeur, son mari, et renoncer à la communauté de biens qui a existé entre elle et lui, et qu'en ce cas, la Cour ordonnera l'enrégistrement du jugement prononçant la séparation des biens, au bureau d'enrégistrement de la division dans laquelle se trouve situé le domicile des parties pour valoir ce que de droit quant à la renonciation.—RAINVILLE, J.—*Pepin vs Labelle*, 11 R L., p. 558.

1314. The judgment which declares the separation of property has a retroactive effect to the day of the institution of the action.—Pothier, *Com.*, 521 ; Lacombe, p. 639 ; 11 Pand. Franç., 415 ; C. N., 1445. [II. 419.]

1315. The separation can be demanded only by the wife herself ; her creditors cannot demand it, even with her consent.

Nevertheless, in the case of insolvency of the husband, they may exercise the rights of their debtor, to the extent of the amounts due them.—Lamoignon, tit. 32, art. 87 ; 3 Delvincourt, 25 ; 11 Pand. Franç., 416 ; C. N., 1446. [II. 419.]

1316. The creditors of the husband may adopt proceedings against a separation of property which has been pronounced, or even executed, in fraud of their rights ; they may even intervene in the suit in which it is demanded, in order to contest it.—*ff Toto titulo, quæ in fraudem credit ;* 3 Delvincourt, 26 ; 3 Maleville, 216 ; 11 Pand. Franç., 417 ; C. N., 1447. [II. 419.]

DECISION :—The creditor of the husband is not entitled to contest the demand for a separation on behalf of the wife and can intervene in such an action only for the preservation of his rights.—Q. B.—*Marchand & Lamirande*, 10 L. C. R.. p. 375.

Digitized by Google

1317. The wife who has obtained a separation of property must contribute in proportion to her means and to those of her husband, to the expenses of the household as well as to those of the education of their common children. She must bear these expenses alone if nothing remain to the husband.—Cod., L. 29; *De jure dotium;* Pothier, *Com.*, nn. 464, 522; 11 Pand. Franç., 419; Merlin, vo. *Séparation de biens*, sec. 2, § 5, n. 8; C. N., 1448. [II. 419.]

DECISION:—If the husband is without means, the creditor may claim from the wife payment of household debts for necessaries supplied after the husband's insolvency.—TORRANCE, J.—*McGibbon vs Morse*, 21 L. C. J., p. 311.

See also cases noted at C. C. 1423.

1318. The wife, when separated either from bed and board or as to property only, regains the uncontrolled administration of her property. She may dispose of and alienate her moveable property. She cannot alienate her immoveables without the consent of her husband or, upon his refusal, without being judicially authorized.—Cod., L., 29, *De jure dotium;* Lebrun, *Com.*, liv. 3, c. 2, sec. 1; Bourjon, liv. 1, part. 4, c. 4, sec. 4, art. 15, 17; Pothier, *Com.*, 464, 522; C. C., 177, 178, 206 et seq.; 11 Pand. Franç., 420; C. N., 217, 219, 1449. [II. 419.]

1319. The husband is not responsible for the omission to invest the price of, or to replace the immoveable alienated by his wife under judicial authorization, unless he has been a party to the contract, or unless the moneys are proved to have been received by him, or to have accrued to his benefit.

He is answerable for the omission to invest or to replace, if the sale have been made in his presence and with his consent.—Lebrun, *Com.*, liv. 3, c. 2, sect. 1, dist. 2, 34; 3 Maleville, 218; 11 Pand. Franç., 421; 3 Delvincourt, 26; C. S. L. C., c. 37, s. 51; C. N., 1450. [II. 419.]

1320. Community dissolved by separation from bed and board, or by separation of property only, may be re-established, with the consent of the parties. In the first case, the return of the wife into the house of the husband legally effects such re-establishment; in the second case, it can only be effected by an act passed before notaries as an original, a copy of which is deposited in the office of the prothonotary of the court which rendered the judgment of separation, and is joined to the record in the case; and mention of such deposit must be made in the register, at the end of such judgment, as also upon the list whereon the separation is inscribed pursuant to article

Digitized by Google

1313.—Lebrun, *Com.*, liv. 3, c. 1, nn. 25 et seq. ; Pothier, *Com.*, 523, 529 ; *Orléans*, tit. 10, art. 199, *Mariage*, 524 ; C. C., 217 ; 3 Maleville, 219 ; 11 Pand. Franç., 423 ; Troplong, *Mariage*, 1466 ; C. N., 1451.—[II. 419.]

DECISION :—Si la femme n'a pas considéré sa communauté dissoute par la mort civile de son mari, dans les rapports subséquents qui ont eu lieu entr'eux sur leurs droits, la cour n'en peut pas prendre connaissance.—C. R.—*Cartier vs Béchard*, 1 L. C. J., p. 44.

1321. In the case of the preceding article, the community so re-established resumes its effect from the day of the marriage ; things are replaced in the same condition as if there had been no separation ; without prejudice, however, to such acts as the wife may have done in the interval, in conformity with article 1318.

Every agreement by which the consorts re-establish their community upon conditions different from those by which it was pre-previously governed, is void.—Lebrun, *Com.*, liv. 3, c. 11, n. 25 ; Pothier, *Com.*, 465, 523, 526, 529 ; 11 Pand. Franç., 423 et seq. ; C. N., 1451. [II. 421.]

1322. The dissolution of the community effected by separation either from bed and board or as to property only, does not give rise to the rights of survivorship of the wife, unless the contrary has been expressly stipulated in the contract of marriage.—Louet et Brodeau, lettre C, n. 26, D, n. 36 ; Renusson, part. 1, c. 9,n. 23 ;Pothier, *Com.*, 519 ; C. C., 36, § 8, 208 ; C. N., 1452. [II. 421.]

II. *Of the continuation of the community.*

1323. If at the time of the natural or civil death of one of the consorts there be minor children issue of their marriage, and the surviving consort fail to have an inventory made of the common property the community continues in favor of such children, if they think proper.—Paris, 240, 241 ; Louet et Brodeau, C, c. 30 ; Pocquet, *Com.*, règle 1, p. 391 ; Pothier, *Com.*, 769, 770, 786 ; Lamoignon, tit. 33, art. 1 ; 3 Maleville, 213, 214 ; 11 Pand. Franç., 407 ; C. N., 1442. [II. 421.]

DECISIONS:—1. The widow being seized with all the property of the community may and is bound to proceed to the inventory and an action to that effect is not necessary and is uncalled for.—In an action by the widow for a division (*partage*) of the community, the minors issue of the marriage must be represented by a tutor *ad hoc* specially appointed to answer such *demande en partage*.—Q. B. —*McTavish & Pyke*, 3 L. C. R., p. 101.

Digitized by Google

2. Que la preuve d'un mariage contracté dans cette Province dans un endroit où il n'y a aucun membre du clergé ni régistres de l'état civil, peut être fait par témoins ; que la communauté des biens résulte de tel mariage, et qu'il y a continuation de communauté, suivant la loi, après le décès de l'un des époux, faute par le survivant de faire l'inventaire pour la dissoudre.—Q. B.—*Cutting & Jordan*, 10 R. L., p. 401.

3. Que sans alléguer dol, fraude ou erreur, le cessionnaire d'usufruit d'un immeuble à la charge expresse de le conserver et remettre au seul enfant et héritier de sa mère à sa majorité, en le reconnaissant comme propriétaire, ne peut pas valablement invoquer le défaut d'une déclaration expresse de dissolution de la communauté entre ses père et mère, dans une instance au pétitoire prise par le fils devenu majeur. (Le cessionnaire d'usufruit par lequel le mineur était reconnu comme propriétaire, avait négligé de payer les taxes sur la propriété et, donc, avait acheté la propriété à une vente pour les taxes.) C. C. 476.—Q. B.—*Bourrassa & Lacerte*, 11 Q. L. R., p. 242.

4. In the above case it was held in the Court of Review :—That it is necessary for the minor who has attained his majority, claiming a share in real estate as having formed part of a continued community, to allege and prove that such continued community has been dissolved, and that he has exercised the option, which the law gives him, of claiming a share in the continued community in preference to a share in the community which existed between his father and mother.—C. R.—*Bourrassa vs Lacerte*, 10 Q. L. R., p. 118.

5. Where a community existed between husband and wife and there was one child issue of the marriage and the wife dying intestate the surviving consort failed to have an inventory made of the common property and (the child being a minor) married a second time without marriage contract, it was held that, in the absence of any demand on the part of the minor for a continued community, a tripartite community did not exist between the surviving consort, his second wife and the child of the first marriage.—Q. B.—*Beckett & Merchants Bank*, 11 L. N., p. 53, M. L. R., 3 Q. B., p. 381.

1324. The inventory required to prevent the continuation of the community must be authentic, it must be made in presence of a person qualified to contest, within three months from the dissolution, and must be judicially closed within three months from its completion, —Paris, 240, 241 ; Pothier, *Com.*, 771 et seq., 2 Prevot de la Jannès. 105 ; Lamoignon, tit. 33, art. 1, 2. [II. 421.]

DECISIONS :—1. In an action for the recovery of fees by a notary for the passing of deeds, the notarial copies of such deeds will be sufficient evidence. The costs of an inventory and copy thereof must be borne by the surviving *conjoint* for one half, and by the representatives of the deceased *conjoint* for the other half.—C. R.—*Trudeau vs Lanaudière*, 7 L. C. J., p. 118.

2. That the inventory of a succession is not null for want of having been judicially closed, nor by reason of errors or omissions, where there is no fraud or dishonesty of any kind.—MEREDITH, J.—*Gingras vs Gingras*, 7 Q. L. R., p. 204.

3. An inventory made by a testamentary executor or universal legatee in perfect good faith (*sincèrement et loyalement.*) is not invalidated by the omission

Digitized by Google

of unimportant formalities —JETTÉ, J.—*Archambault vs Citizens Insurance Co.*, 24 L. C. J., p. 293. 3 L. N., p. 416.

4. Que l'inventaire faite par le tuteur des biens dont il a la gestion, est valable, bien que le tuteur ait omis d'en signer toutes les vacations, si cet inventaire a été régulièrement clos en justice.—Q. B.—*Grégoire & Grégoire*, 4 Q. B. R., p. 308, 30 L. C. J., p. 286, 12 Q. L. R., p. 32. M. L. R., 2 Q. B., p. 228.—SUPREME COURT.—9 L. N., p. 410.

5. Que celui qui est tenu de faire inventaire a le choix du notaire instrumentaire, mais que les autres parties ont le droit d'y commettre un second notaire.—MATHIEU, J.—*Labelle vs Labelle*, M. L. R., 2 S. C., p. 167.

1325. The continuation of the community, when it is demanded by the minor children, avails also those of the same marriage who are of age, if they choose to take advantage of it.—Renusson, *Com.*, c. 2, nn. 36, 37; Lacombe, *Com.*, 116; Pocquet, *Com.*, art. 5; Pothier, *Com.*, 800, 813 et seq.; Lamoignon, tit. 33, art. 22. [II. 421.]

1326. The surviving consort does not succeed to his children who die during the continuation of the community, as regards property belonging to it; the shares of such children accrue to the others who survive.—Paris, 243: 2 Laurière, 235 et seq.; Lamoignon, tit. 33, art. 30, 31. [II. 421.]

1327. The continued community is shared in halves between the survivor and his children.

If the survivor remarry, it is shared in thirds; the husband and wife having each one third, and the children of the first marriage the other third.

If each of the consorts have minor children of a previous marriage, the community continues in fourths, and is thus subdivided according to the number of marriages; the children of each marriage forming but one head.—Paris, 242; Pocquet, *Com.*, art. 9; Lamoignon, tit. 33, art. 36, 37, 38, 39; 2 Laurière, 234-5; 2 Prevot de la Jannès, 109. [II. 421.]

DECISIONS: 1. A party who contracts a second marriage cannot dispose, by marriage contract in favor of his second wife, of any portion of the *conquêts* of the first community or of a greater portion of the *acquêts* than those accruing to the child taking the smallest share.—C. R.—*Keith vs Bigelow*, 2 L. C. R., p. 175.

2. A tripartite community of property is dissolved by the death of the second wife who dies without leaving any minor children, and, therefore, the third share of the second wife in an immoveable purchased during the existence of such tripartite community is a *propre* of the issue of such second marriage.—The surviving husband has no power to alienate such immoveable after the death

Digitized by Google

of the second wife.—The purchaser of the rights of said issue, of age at the death of the mother, has a right to claim a *partage* of said immoveable.—Q. B.—*Francœur & Mathieu*, 21 L. C. J., p. 288.

3. That in consequence of the failure of the mother of the Plaintiff to make an inventory of the community of property which had existed between her and their father, who died on the 14th June 1832, intestate, leaving the Plaintiffs, then minors, as his heirs at law, and her re-marriage with the Defendant, without a contract of marriage, on the 19th March 1840, a tripartite community of property was formed between the Defendant, the mother and the Plaintiff and the fact that there was not really any property belonging to the first community was immaterial.—MATHIEU, J.—*Almour vs Ramsay*, 26 L. C. J., p. 167.

4. See also case noted at C. C. 1323, n. 5.—Q. B.—*Beckett & Merchants Bank*, 11 L. N., p. 53, M. L. R., 3 Q. B., p. 381.

1328. The continued community cannot be divided, that is, accepted for a portion of the time that it has lasted, and rejected for the remainder; it must be accepted or rejected in its entirety.—2 Provot de la Jannès, p. 115; 2 Argou, 47; Pocquet, *Com.*, règle X; Lamoignon, tit, 33, art. 40. [II. 421.]

1329. All the moveable property as well as the fruits of the immoveables which formed part of the first community remain in the continuation; but the immoveables which formed part of the first community are excluded from the second, and become the private property of the survivor for one half, and of the children for the other half.—Lebrun, *Com.*. liv. 3, c. 3, § 2, nn. 1 et seq.; 2 Argou, 53; 2 Prevot de la Jannès, 106; Lacombe, *Com.*, p. 116; Renusson, *Com.*, c. 3, n. 8 10; Pothier, *Com.*, 818 et seq.; Lamoignon, tit. 33, art. 32, 33. [II. 423.]

DECISION:—The husband has no power to hypothecate an immoveable *conquêt* of the community after the dissolution of the community, and a hypothec given by him at that time can only affect his half of the property.—The heirs at law of the deceased wife are seized, by operation of law, of her share in such immoveable.—Although article 2098 of the Civil Code obliges the heirs to register their title, the only penalty attached to their failure to do so is that all conveyances, transfers or real rights granted by them are without effect.—Q. B.—*Dallaire & Gravel*, 22 L. C. J., p. 286.

1330. All property accruing to the surviving consort after the dissolution of the marriage and which would have fallen into the community if it still existed, falls likewise into the continuation.—Lebrun, *Com.*, liv. 3, c. 3, sec. 2, nn. 10 et seq.; 2 Prevost de la Jannès, 106; Pocquet, règle 11; Renusson, *Com.*, liv. 3, c. 3, sec 3, dist. 1, n. 7; Pothier, *Com.*, 824 et seq.; Lacombe, *Com.*, 116, n. 9. [II. 423.]

1331. A different rule applies to the children; whatever they

Digitized by Google

acquire during the continuation from other sources than the first community, by whatsoever title it may be, does not fall into the continuation, either as regards the property itself or as regards its revenues. —Lebrun, *Com.*, c. 3, sec. 3, dist. 1, n. 7; Prevost de la Jannès, 106-7; Pocquet, règles 11, 12, p. 397-8; Renusson, *Com.*, c. 3, nn. 21, 33; Lacombe, 116, 117; Pothier, *Com.*, 829 et seq. [II. 423.]

1332. The liabilities of the continued community are:

1. The moveable debts of the first community, including the reprises and replacements due to either of the consorts, as well as the preciput of the survivor;

2. The arrears and the continuation of rents due by the first community;

3. The debts contracted by the survivor for the affairs of the continuation, but not those unconnected with it.—Lebrun, *Com.*, liv. 3, c. 3, sec. 3; Renusson, part. 4, c. 1; Prevost de la Jannès, 107, 108; Pocquet, règle 13, p. 399; Lacombe, 117; Pothier, *Com.*, 837 et seq. [II. 423.]

DECISION:—A widow who has been condemned as *commune en biens* to pay a debt of the community may claim her dower in preference to the creditors of the community although she has not renounced thereto, on the principle that she is only bound to pay the debts out of what she receives from the community. —Superior Court. (*Judge's name not given*)—*Delisle vs Richard*, 6 L. C. R., p. 37.

1333. The survivor is the head and the administrator of the continued community, and as such may dispose of all that belongs to it, provided it be otherwise than by gratuitous title and without fraud.—Paris, 225; 2 Prevot de la Jannès, 109, 111; 2 Argou, 56; Pocquet, règle XIII, p. 399; Lacombe, *Com.*, n. 12, p. 117; Pothier, *Com.*, 859; Lamoignon, tit. 33, art. 4. [II. 423.]

DECISIONS:—1. Le mari survivant ne peut pas hypothéquer, durant la continuation de sa communauté qui n'est pas demandée par les enfants mineurs, leur part afférente dans un immeuble ameubli par son contrat de mariage, vu que cette part devient propre naissant des enfants qui y succèdent.—Q. B.—*Parent & Lalonde*, 15 L. C. J., p. 37.—C. R.—13 L. C. J., p. 231.

2. The husband cannot hypothecate more than his own half of an immoveable of the community which existed between him and his deceased wife; and the heirs at law of the wife, though they have failed to register their title as required by C. C. 2098, may claim the wife's share in preference to the mortgagee whose hypothec is duly registered.—Q. B—*Dallaire & Gravel*, 2 L. N., pp. 15, 22 L. C. J., p. 286.

1334. The survivor and his children take their food and main-

Digitized by Google

tenance out of the continuation of the community, without compensation being due from either side, although their expenses be not equal. —Pocquet, p. 400; Renusson, *Com.*, part. 3, cc. 3, 6; Bacquet, *Droits de Justice*, c. 15, n. 26. [II. 423.]

1335. The continuation of the community is dissolved by the natural or civil death of the survivor, or in consequence of all the children dying without issue.

It may also be dissolved at any time upon the demand of either of the parties, although some of the children should still be under age.—Paris, 242; 2 Argou, 52-4; Lebrun, *Com.*, c. 3, sec. 3, n. 1; Renusson, part. 2, n. 18; 2 Prevot de la Jannès, 112-3; Lacombe, 118, n. 17; Pothier, *Com.*, 854 et seq. [II. 423.]

DECISION:—Le décès de la seconde femme, lorsqu'elle ne laisse qu'un enfant majeur issu de ce second mariage, à qui elle lègue tous les biens, et sans enfants mineurs, à l'effet de dissoudre la communauté de biens tripartite qui existait entre elle et son époux et les enfants du premier mariage de ce dernier, sans toutefois dissoudre la communauté entre le survivant et les enfants de son premier mariage qui continue entre eux comme elle existait avant le second mariage.—Q. B.—*Francœur & Mathieu*, 8 R. L., p. 665.

1336. If the dissolution be demanded by the survivor and some of the children be still minors, his demand must be preceded by an inventory which he must make according to the form of that required to prevent the continuation; and for such purpose, a tutor *ad hoc* is named in order to represent the minors and to stand as an adverse party.—2 Prevot de la Jannès, 113; Pothier, *Com.*, 854 et seq. [II. 423.]

Amendments:—Article 1336 of the Civil Code is amended to read in the following manner:—

"**1336.** If the dissolution be demanded by the survivor, and some of the children be still minors, his demand must be preceded by an inventory, which he must make according to the form of that required to prevent the continuation of community, and for such purpose the subrogate tutor represents the minors, and stands as an adverse party."—Q. 38 Vict., cap. 13, s. 1.

The Act intituled "An act to render valid certain Inventories" enacts as follows:—

Whereas, since the promulgation of the civil code, a large number of inventories to effect the dissolution of the continuation of communities of property have been executed without a tutor *ad hoc*

Digitized by Google

having been previously appointed to represent the minors interested in such inventories and to stand as an adverse party, as required by article 1336 of the said code, which neglect might cause the ruin of many families: Therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. Every inventory to effect the dissolution of a continuation of a community, made since the promulgation of the civil code and before the coming into force of this act, shall be and be held to be valid to all intents and purposes, notwithstanding the non-observance of that part of article 1336 of the said code, which requires the appointment of a tutor *ad hoc*, to represent the minors, and to stand as an adverse party; provided always, that the subrogate tutor of the minors was present at the making of the inventory, and provided also, that all the other formalities required by law for the validity of inventories were observed, and that such inventory was closed within the time and according to the manner required by law.

2. The provisions of this act shall not apply to cases now pending.—Q. 36 Vict., cap. 23.

The Act intituled "An Act to render valid certain Notarial Instruments," enacts as follows:—

4. All inventories made since the civil code came into force, in presence of the tutor and subrogate tutor, but without the presence of a tutor *ad hoc*, in conformity with article 1336 of the civil code, shall be deemed good and valid; without prejudice to pending causes. —Q. 38 Vict., cap. 23, s. 4.

1337. If such dissolution be demanded by the children, they may compel the survivor, either in their own name if they be all of full age, or in the name of their tutor, for such as are minors, to make an inventory and to render them an account.—Paris, 242; 2 Prevot de la Jannès, 113; Pothier, *Com.*, 854, 855 et seq. [II. 425.]

§ 4. *Of the acceptance of the community and of the renunciation that may be made thereof, with the conditions relative thereto.*

1338. After the dissolution of the community, the wife or her heirs or legal representatives, have a right either to accept or renounce it; any agreement to the contrary is void.—Paris, 257; Bourjon, liv. 3, part. 4, c. 5, sec. 1, n. 2; Orléans, 204; Pothier, *Intr. à Com.*, n. 9, *Com.*, 243, 531, 535, 547, 549, 550, 551; 3 Maleville, 220; 11 Pand. Franç., 425; C. N., 1453. [II. 425.]

Digitized by Google

1339. A wife who has intermeddled with the property, cannot renounce the community.

Acts of mere administration or of a conservatory nature do not constitute intermeddling.—Cod., L. 1, *De repud. vel. abstin. hæred.*; L. 2, *De jure deliberandi*; Paris, 237; Orléans, 204; Pothier, *Com.*, 538, 539, 540; *Orl.*, sur art. 204; *Intr. tit.* 10, *Orl.*, tit. 91; Renusson, *Com.*, part. 2, c. 1, n. 9; C. N., 1454. [II. 425.]

1340. A wife of full age who has once assumed the quality of common as to property, can no longer renounce it, nor be relieved from such quality, unless there has been fraud on the part of the heirs of the husband.—Bourjon, liv. 3, part. 4, c. 5, dist. 3, n. 93; Coquille, *Quest.* 115; 3 Maleville, 221; 11 Pand. Franç., 426; Pothier, *Com.*, 532, 536, 558; *Intr. tit.* 10, *Orl.*, n. 93; Merlin, Rép., vo. *Renonciation à Com.*, n. 6.; C. N., 1455. [II. 425.]

1341. [If the wife be under age, she cannot accept the community without the assistance of her curator, and the authorization of a judge, upon the advice of a family council; when made with these formalities, the acceptance is irrevocable, and has the same effect as if the wife had been of age.]—Coquille, *Quest.* 115; Pothier, *Com.*, 532, 558; *Intr. tit.* 10, *Orl.*, n. 93; C. C., 182, 301, 1001 et seq. [II. 425.]

1342. The wife surviving her husband must, within three months from his death, cause a faithful and correct inventory of all the property of the community to be made in the presence of the heirs of the husband, or after having duly summoned them.—Paris, 237; Bourjon, liv. 3, part. 4, c. 5, dist. 2. n. 28; Pocquet, *Com.*, règles 48, p. 337; Pothier, *Com.*, 560, 561, 563, 566, 681-2-7; *Cout. d'Orl.*, art. 204, notes 6, 7; Ord. 1667, tit. 7, art. 5; Merlin, Rép., vo. *Inventaire*, § 5, n. 3. [II. 425.]

[This inventory must be made in notarial form, as an original, and be judicially closed in the manner required by article 1324 in order to prevent the continuation of the community.]—C. N., 1456. [II. 427.]

DECISIONS:—1. The widow being seized with all the property of the community may and is bound to proceed to the inventory and an action to that effect is unnecessary.—Q. B.—*McTavish & Pyke*, 3 L. C. R., p. 101.

2. Le donataire universelle en usufruit par contrat de mariage, est tenue d'avancer les frais d'inventaire des biens sujets à son usufruit.—Les honoraires d'un notaire employé par les héritiers du défunt, qui agit à la confection de tel

Digitized by Google

inventaire concurremment avec le notaire choisi par l'usufruitière, forment partie de ces frais.—BERTHELOT, J.—*Prévost vs Forget*, 12 L. C. J., p. 54.

1343. The wife may however renounce the community, without making an inventory, in the following cases: when the dissolution takes place during the lifetime of the husband; when the heirs of the latter are in possession of all the property; when an inventory has been made at their instance, or one has been made shortly before the death of the husband; when a general seizure and sale of the property of the community have been recently made, or when it has been established by an official return that none existed.—Pothier, *Com.*, 561, 563, 564, 565; *Cout. d'Orl.* art 204, notes 6, 7. [II. 427.]

1344. Besides the three months allowed the wife to make the inventory, she has, in order to deliberate upon her acceptance or repudiation, a delay of forty days, which commence to run from the expiration of the three months, or from the closing of the inventory, if it have been completed within the three months.—Ord. 1667, tit. 7, art. 1, 2; Pothier, *Com.*, 552-3; *Intr. tit.* 10, *Orl.*, n. 92; C. C., 664; C. N., 795, 1457. [II. 427.]

1345. Within these delays of three months and forty days, the wife must make her renunciation, by means of an act in notarial form, or of a judicial declaration, which the court orders to be recorded.—Pothier, *Com.*. 552, 553; *Intr. tit.* 10, *Orl.*, n. 92; C. C. 651; C. N., 1457. [II. 427.]

1346. The wife who is sued as being in community, may nevertheless, according to circumstances, obtain from the court an extension of the delays established by the foregoing articles.—Ord. 1667, tit. 7, art. 4, 5; C. C. 667; C. N., 1458. [II. 427.]

1347. The wife who has neither made an inventory nor renounced within the delays above prescribed or granted, is not therefore precluded from doing so; she is, on the contrary, allowed to do so, so long as she has not intermeddled or has not acted as being in community; but she can be sued as being in community so long as she has not renounced, and she is liable for the costs incurred against her up to the time of such renunciation.—Pothier, *Com.*, 534, 544, 556, 557; *Intr., tit.* 10, *Orl.*, n. 93; Renusson, *Com.*, part. 2, c. 1, n. 28; 3 Maleville, 222, C. C. 656; C. N., 1459. [II. 427.]

Digitized by Google

1348. The widow who has abstracted or concealed any of the effects of the community is declared to be in community, notwithstanding her renunciation; the same rule applies to her heirs.—Lebrun, *Com.*, liv. 3, c. 2, dist. 2; Pocquet, p. 389; Renusson, *Com.* part. 2, c. 2; Pothier, *Com.*, 690; *Cout. d'Orl.*, art. 204; 11 Pand. Franç. 429; C. N., 1460. [II. 427.]

1349. If the widow die before the expiration of the three months, without having made or completed the inventory, her heirs have, in order to make and complete it, a further delay of three months, reckoning from her death, and of forty days after the closing of the inventory, in order to deliberate.

If the widow die after completing the inventory, her heirs have, in order to deliberate, a fresh delay of forty days from her death.

They may moreover in all cases renounce the community, according to the forms established with regard to the wife, and articles 1346 and 1347 are applicable to them.—3 Delvincourt, 30; Favard de Langlade, *Rég. dotal*, § 2, n. 10; 5 Marcadé, p. 601; C. N., 1461. [II. 427.]

DECISION:—Une réclamation, quoique de sa nature dette de la communauté, peut être également exercée contre les héritiers personnels de la femme, nonobstant la renonciation par ces derniers à la communauté de biens.—PAPINEAU, J.—*Perrault vs Etienne*, 22 L. C. J., p. 210.

1350. The provisions of article 1342 and of those which follow it apply to the wives of individuals who are civilly dead, commencing from the moment at which civil death took place.—C. C., 36, §§ 7, 8; 11 Pand. Franç., 430; C. N., 1462. [II. 429.]

1351. The creditors of the wife may impugn the renunciation which she or her heirs may have made in fraud of their claims and may accept the community in their own right.

In such case, the renunciation is annulled only in favor of the creditors and to the extent of the amount of their claims. It is not annulled in favor of the wife or of her heirs who have renounced.—*ff Arg. ex titulo, Quæ in fraudem credit*; Pothier, *Com.*, 533, 559; C. C., 655, 1031; 11 Pand. Franç., 432; C. N., 1464. [II. 429.]

1352. The widow, whether she accepts or renounces, has a right, during the delays which are prescribed or allowed her in order to make the inventory and to deliberate, to sustain herself and her do-

Digitized by Google

mestics, upon the provisions then existing, and in default of these by means of loans obtained on account of the community, subject to the condition of making a moderate use thereof.

She owes no rent for her occupation, during these delays, of the house in which she remains after the death of her husband, whether such house belongs to the community or to the heirs of the husband, or is held under lease ; in the last case the wife does not contribute to the payment of the rent during these delays but it is taken out of the mass.—Pothier, *Com.*, 542, 770, 771 ; 3 Maleville, 224-5 ; 11 Pand. Franç., 433 ; 3 Delvin, 31 ; 5 Proudhon, *Usufruit*, n. 2799 ; C. N., 1465. [II. 429.]

1353. When the community is dissolved by the previous death of the wife, her heirs may renounce it within the delays and according to the forms prescribed by law with regard to the surviving wife, saving that they are not obliged for that purpose to make an inventory—Pothier, *Com.*, 559, 562 ; 11 Pand. Franç., 433-4 ; C. N., 1466. [II. 429.]

§ 5. *Of the partition of the community.*

1354. After the acceptance of the community by the wife or her heirs, the assets are divided and the liabilities borne in the manner hereinafter determined.—Pothier, *Com.*, 548, 582 ; *Cout. d'Orl.*, art. 186 ; C. N., 1467. [II. 429.]

DECISION:—On a *défense en droit* to an action for a specific sum as the proceeds of a community between the plaintiff and his late wife, it was held that the action should have been an action *en partage* and the action as taken was therefore dismissed.—Day and Smith, JJ.—*Dupuis vs Dupuis*, 6 L. C. R., p. 475.

1. *Of the partition of the assets.*

1355. The consorts or their heirs return into the mass of the community all that they owe it by way of compensation or indemnity, according to the rules above prescribed in the second paragraph of this section.—Pothier, *Com.*, 582, 583, 612 ; 3 Maleville, 225 ; 11 Pand. Franç., 435 ; C. N., 1468. [II. 429.]

1356. Each consort or his heirs return likewise the sums drawn from the community, or the value of the property taken therefrom by such consort, in order to endow a child of another marriage, or to endow personally their common child.—Renusson, *Com.*, part. 2, c. 3,

Digitized by Google

n. 16; Pothier, *Com.*, 641; *Intr. tit*, 10, *Orl.*, nn. 130-1; C. N., 1469. [II. 429.]

1357. Out of the mass of the community each consort or his heirs pretake:

1. Such of his private property as did not enter into the community, if it exist in kind, or such property as has been acquired in replacement of it;

2. The price of such of his immoveables as have been alienated during the community and have not been replaced;

3. The indemnities due him by the community.—Paris, 232; Orléans, 192; Louet et Brodeau, R. c. 30; Lebrun, *Com.*, liv. 3, c. 2, sec. 6; Pothier, *Com.*, 9, 100, 112, 116, 584, 607, 609, 701; *Intr. tit.* 10, *Orl.*, nn. 99, 112; C. N., 1470. [II. 429 to 431.]

1358. The pretakings of the wife take precedence of those of the husband. They are effected, as regards such property as no longer exists in kind, first upon the ready money, next upon the moveable property, and subsidiarily upon the immoveables of the community; in the last case, the choice of the immoveables is left to the wife and to her heirs.—Pothier, *Com.*, 701; *Intr. Cout. d'Orl.*, nn. 98, 117; 3 Maleville, 226; 11 Pand. Franç., 437; 12 Toullier, 513; C. N., 1471. [II. 431.]

1359. The husband takes his reprises only upon the property of the community.

The wife and her heirs, in case the community proves insufficient, may exercise theirs upon the private property of the husband. —Pothier, *Com.*, 610; *Intr. tit.* 10, *Orl.*, n. 117; 11 Pand. Franç., 437; 3 Delvincourt, 36; C. N., 1472. [II. 431.]

DECISION:—Par les dispositions de la 29e clause du ch. 30 de la 4e Vict., aucune hypothèque légale ou tacite ne subsiste sur les propriétés du mari pour le remploi des propres de la femme aliénés durant le mariage. (S. R. B. C., ch. 37-sec. 51.)—SMITH, J.—*Armstrong vs Rolston*, 9 L. C. J., p. 16.

1360. The replacements and compensations due by the community to the consorts, and the compensations and indemnities due by them to the community, bear interest, by law, from the day of its dissolution.—Pothier, *Com.*, 589, 702; *Intr. tit.* 10, *Orl.*, n. 134; 3 Maleville, 227; 11 Pand. Franç., 438; C. N., 1473. [II. 431.]

Digitized by Google

1361. After the pretakings have been effected and the debts have been paid out of the mass, the remainder is divided equally between the consorts or their representatives.—Pothier, *Com.*, 530, 577, 701, 702; 11 Pand. Franç., 438; 3 Delvincourt, 36; C. N., 1474. [II. 431.]

1362. If the heirs of the wife be divided, so that some have accepted and others have renounced the community, those who have accepted cannot take out of the property falling to the wife's share any more than they would have received if all had accepted.

The residue remains with the husband, who is liable toward the heirs who have renounced for such rights as the wife might have exercised in case of renunciation, but only to the extent of the hereditary share of each heir who has thus renounced.—Pothier, *Com.*, 578, 579; *Intr. tit.* 10, *Orl.*, n. 95; 11 Pand. Franç., 439; C. N., 1475. [II. 431.]

1363. The partition of the community, in all that regards its forms, the licitation of immoveables when there is occasion for it, the effects of the partition, the warranty which results from it, and the payment of differences, is subject to all the rules established in the title *Of Successions* for the partition among coheirs.—C. C., 689 et seq.; 3 Delvincourt, 36; C. N., 1476. [II. 431.]

1364. The consort who has abstracted or concealed effects belonging to the community, forfeits his share of such effects.—Lebrun, *Com.*, liv. 3, c. 2, sec. 2, n. 31; Louet et Brodeau, R. n. 1; Pothier, *Com.*, 690, 691; 3 Maleville, 227, 228; 11 Pand. Franç., 440, 441; C. N., 1477. [II. 431.]

1365. After the partition has been effected, if one of the consorts be the personal creditor of the other, as when the price of a property of the former has been applied to the payment of a personal debt of the other, or for any other cause, he may prosecute his claim out of the share of the community allotted to his debtor or out of the personal property of such debtor.—Pothier, *Com.*, 676, 680; 11 Pand. Franç., 441; C. N., 1478. [II. 431.]

1366. The personal claims which the consorts may have to enforce against each other bear interest only according to the ordinary rules.—*ff Arg. ex lege* 17, § 3, *De usuris;* L. 127, *De verb. oblig.;*

Digitized by Google

Merlin, Rép., vo. *Gains nuptiaux*, § 5, n. 3; 11 Pand. Franç., 441, 442; C. N., 1479. [II. 433.]

1367. Gifts made by one consort to the other are not taken out of the community, but only from the share of the donor therein, or from his private property.—Pothier, *Com.*, 679; 11 Pand. Franç., 442; 3 Delvincourt, 38; C. N., 1480. [II. 433.]

1368. The mourning of the wife is chargeable to the heirs of her deceased husband.

The cost of such mourning is to be regulated according to the fortune of the husband.

It is due even to the wife who renounces the community.—Cod., L. 22, § 9, *De jure deliberandi;* L. 13, *De negotiis gestis;* Renusson, *Com.*, part. 2, c. 3, n. 28; Pothier, *Com.*, 275, 678; 11 Pand. Franç., 243; 3 Delvincourt, 31; C. N., 1481. [II. 433.]

II. *Of the liabilities of the community and of the contribution to the debts.*

1369. The debts of the community are chargeable one half to each of the consorts or his heirs.

The expenses of seals, inventories, sales of moveable property, liquidation, licitation and partition, are included in such debts.—Pothier, *Com.*, 274, 275, 498, 548, 576, 726, 733; Bourjon, liv. 3, part. 6, c. 6, sec. 4, art. 19; Pothier, *Intr. tit.* 10, *Orl.*, 135; C. N., 1482. [II. 433.]

1370. The wife even though she accepts the community, is not liable for its debts, either toward her husband or toward creditors, beyond the amount of the benefit she derives from it; provided she has made a good and faithful inventory and has rendered an account both of what is contained in such inventory and of what has fallen to her in the partition.—Paris, 221, 228; Renusson, *Com.*, part. 2, c. 6, n. 5; Pothier, *Com.*, 727, 729, 759, 703, 726, 733, 735 et seq., 740, 745, *Obl.*, 84; *Intr. tit.* 10, *Orl.*, n. 187; 3 Maleville, 230; 11 Pand. Franc., 445; C. N., 1483. [II. 433.]

DECISION:—A widow who has been condemned as *commune en biens*, to pay a debt of the community, may claim her dower, in preference to the creditors of the community, although she has not renounced thereto, on the principle that she is only bound to pay the debts out of what she receives from the community. —C. R.—*Delisle vs Richard*, 6 L. C. R., p. 37.

Digitized by Google

1371. The husband is liable toward the creditors for the whole of the debts of the community which were contracted by himself; saving his recourse against his wife or her heirs, if they accept, for the half of such debts, or for an amount equivalent to the benefit which they have derived from the community. — Lebrun, *Com.*, liv. 2, c. 3 ; Renusson, *Com.*, part. 2, c. 6, n. 5 ; Pothier, *Com.*, 227, 229, 759 ; *Intr. tit.* 10, *Orl.*, nn. 135, 136 ; 3 Maleville, 230; 11 Pand. Franç., 455 ; C. N., 1484. [II. 433.]

1372. He is liable only for half of such personal debts of his wife as were chargeable to the community unless the share coming to the wife proves insufficient to pay her half.—Lebrun, *Com.*, liv. 2, c. 3, sec. 1, n. 18 ; Pothier, *Com.*, 730 ; *Intr. tit.* 10, *Orl.*, nn. 137, 138 ; 3 Maleville, 230, 231 ; 11 Pand. Franç., 455 et seq. ; C. N., 1485. [II. 433.]

1373. The wife may be sued for the whole of the debts which are attributable to herself and have fallen into the community ; saving her recourse against the husband or his heirs, for half of such debts, if she accept, and for the whole, if she renounce.— Renusson, *Com.*, part. 2, c. 6, nn. 12, 13 ; Pothier, *Com.*, 731, 739, 759 ; *Intr. tit.* 10, *Orl.*, n. 138 ; 11 Pand. Franç., 456 ; C. N., 1486. [II. 433.]

1374. The wife who during the community, binds herself for or together with her husband, even jointly and severally, is held to have done so only in her quality of common as to property ; if she accept she is personally bound for her half only of the debt thus contracted, and she is not at all liable if she renounce. — C. S. L. C., c. 37, s. 55 ; C. N., 1487. [II. 433 to 435.]

DECISION :—Que la renonciation à la communauté de biens faite par une femme en se séparant de biens judiciairement d'avec son mari la libère entièrement de toutes les obligations qu'elle a pu encourir comme commune en biens avant la séparation.—Jetté, J.—*Bourgoin vs Roy*, M. L. R., 3 S. C., p. 168.

1375. The wife who has paid more than her half of a debt of the community, cannot get back what she has overpaid, unless the receipt expresses that what she paid was for her half.

But she retains her recourse against her husband or his heirs.— *ff* L. 19, L. 44, L. 65, *De condictione indeb.* ; Pothier, *Com.*, 736, 738 ; *Intr. tit.* 10, *Orl.*, art. 187, note 4 ; 3 Maleville, 231 ; 11 Pand. Franç., 457 ; 3 Delvincourt, 37 ; C. N., 1488. [II. 435.]

Digitized by Google

1376. The consort who, by reason of the enforcing of a hypothec upon the immoveable which has fallen to his share, is sued for the whole of a debt of the community, has his legal recourse for one half of such debt against the other consort or his heirs.—Pothier, *Com.*, 751, 759 ; *Intr. tit.* 10, *Orl.*, nn. 104, 140 ; 11 Pand. Franç., 457, 458 ; C. N., 1489. [II. 435.]

1377. Notwithstanding the foregoing provisions, either of the copartitioners may, by the partition, be charged with the payment of a proportion of the debts, other than half, or even with the payment of the whole.—Pothier, *Com.*, 759 ; *Intr. tit.* 10, *Orl.*, n. 140 ; 11 Pand. Franç., 458, 459 ; C. N., 1490. [II. 435.]

1378. All that has been declared above in respect of the husband or of the wife applies to the heirs of either, and such heirs exercise the same rights and are subject to the same actions as the consort whom they represent.—*ff* L. 24, *De verb. signif.* ; L, 119, *De adquirendâ vel omit. hæred.* ; Pothier, *Com.*, 730, 733, 737, 741, 744, 750 ; C. N., 1491. [II. 435.]

§ 6. *Of renunciation of the community and of its effects.*

1379. The wife who renounces, cannot claim any share in the property of the community, not even in the moveable property she herself brought into it.—C. N., 1492. [II. 435.]

DECISION :—Where a wife, ***commune en biens*** with her husband, buys property during the existence of the community, and in the deed is described as ***séparée de biens***, and she, subsequently, after the death of her husband, renounces to the community, she cannot successfully oppose the sale of the property by the creditors of her husband.—SUPREME COURT.—***McCorkill & Knight***, 3 S. C. R., p. 233.

1380. [She may, however, retain the wearing apparel and linen in use for her own person, exclusive of all other jewelry than her wedding presents.]—Pothier, *Com.*, 549, 568, 569, 572 ; 3 Maleville, 232 ; 11 Pand. Franç., 460 ; 3 Delvincourt, 39 ; Merlin, Rép., vo. *Accroissement* ; C. N., 1492. [II. 435.]

1381. The wife who renounces has a right to take back :

1. The immoveables belonging to her, if they exist in kind, or those which have been acquired to replace them ;

2. The price of her immoveables which have been alienated, and

Digitized by Google

the replacement of which has not been made and accepted as mentioned above in article 1306 ;

3. The indemnities which may be due to her from the community.—Paris, 232 ; Orléans, 192 ; Lebrun, *Com.*, liv. 3, c. 2, sec. 6 dist. 1, n. 1 ; Pothier, *Com.*, 99, 100, 585, 595, 602, 609 ; *Intr. tit.* 10, *Orl.*, nn. 99, 100, 112, 116 ; 11 Pand. Franç., 461 ; C. N., 1493, [II. 435.]

DECISION :—La renonciation de la femme à l'exercice de ses droits et reprises, en faveur d'un créancier de son mari, n'est pas un cautionnement, et en conséquence, telle renonciation est valable.—SMITH, J.—***Armstrong vs Rolston***, 9 L. C. J., p. 16.

1382. The wife who renounces is freed from all contribution to the debts of the community, both as regards her husband and as regards creditors, even those towards whom she bound herself jointly and severally with her husband.

She remains liable however for debts which are attributable to herself and have fallen into the community, saving, in such case, her recourse against her husband or his heirs.—Renusson, *Com.*, part, 2, c. 6, n. 15 ; Pothier, *Com.*, 573, 574, 575, 731, 732 ; *Intr. tit.* 10. *Orl.*, n. 14 ; Orléans. 205 ; C. S. L. C., c. 37, sec. 55 ; 3 Maleville, 233 ; 11 Pand. Franç., 462 ; C. N., 1494. [II. 435 to 437.]

DECISION :—Que la femme, marchande publique, ne pourrait se dégager de son obligation personnelle, même en renonçant à la communauté, sauf le recours contre son mari ou sa succession. Elle est alors dans le cas d'une femme qui a souscrit une obligation avec l'autorisation du mari (C. C. 179.)—MOUSSEAU, J.—***Perrier vs Quinn***, 8 L. N., p. 19.

1383. She may exercise all the rights and reprises hereinabove enumerated, as well against the property of the community as against the private property of her husband.

Her heirs may do the same, except as regards the pretaking of linen and wearing apparel, and as regards lodging and maintenance during the delays allowed for the inventory and for deliberating ; which rights are purely personal to the surviving wife.—Pothier, *Com.*, 572, 583, 680 ; 11 Pand. Franç., 463 ; 3 Delvincourt, 21, 40 ; C. N., 1495. [II. 437.]

SECTION II.—OF CONVENTIONAL COMMUNITY AND OF THE MOST ORDINARY CONDITIONS WHICH MAY MODIFY OR EVEN EXCLUDE LEGAL COMMUNITY.

1384. The consorts may modify the legal community by all kinds of agreements, not contrary to articles 1258 and 1259.

Digitized by Google

The principal modifications are those which result from stipulating :

1. By way of realization, that the moveable property either present or future, shall not enter into the community or shall only enter for part ;

2. By way of mobilization, that the whole or a portion of the immoveables present or future shall be included in it ;

3. That the consorts shall be separately liable for their debts contracted before marriage ;

4. That in case of renunciation, the wife may take back from the community, free and clear from all claims, whatever she brought into it ;

5. That the survivor shall have a preciput ;

6. That the consorts shall have unequal shares ;

7. That universal community, or a community by general title, shall exist between them.—Pothier, *Com.*, 272, 466 ; 12 Pand. Franç., pp. 5 et seq ; 2 Rogron, *Code Civil*, p. 1819 ; C. N., 1497. [II. 437.]

DECISIONS :—1. Dame Joséphine Viau a épousé en premières noces Benjamin Lecours. Dans leur contrat de mariage, fait en 1879, la communauté de biens y était stipulé et les époux y font donation mutuelle et réciproque de leurs biens en faveur du survivant en par lui gardant viduité et " pourvu qu'aux jour et " heure du décès du premier mourant il ne se trouve aucun enfant né ou à naître " au dit futur mariage, ou qu'y en ayant vint ou vinssent à décéder avant d'avoir " atteint l'âge de majorité ou d'être pourvu par mariage ou autrement, auquel cas " la présente donation reprendra sa première force et vertu." Un enfant est né de ce mariage. Le père, Benjamin Lecours, est décédé le 24 janvier 1882. L'enfant lui a survécu, mais est décédé le 3 mars 1884. L'épouse Joséphine Viau, convole en seconde noces le 1er mai 1884. Les appelants, frères et sœurs de Benjamin Lecours, se prétendent ses héritiers.—JUGÉ :—Que les appelants étaient sans droit pour porter leur action et qu'ils n'étaient pas les héritiers de Benjamin Lecours. Que l'enfant, issu de ce mariage, a succédé à son père décédé *ab intestat* et qu'ensuite l'intimée Joséphine Viau a hérité de son enfant ; qu'en conséquence elle était seule propriétaire.—Q. B.—*Lecours & Viau*, 32 L. C. J., p. 8.

2. Que le don mutuel d'usufruit n'est pas une donation proprement dite, mais constitue une simple convention de mariage contenant avantage réciproque en faveur des parties et qui, comme tel, échappe à la nécessité de l'enrégistrement.—C. R.—*Marchessault vs Durand*, 16 R. L., p. 193.

§ 1. *Of the clause of realization.*

1385. By the clause of realisation the parties exclude from the community, either wholly or in part, the moveable property which would otherwise fall into it.

When they stipulate that they will reciprocally put into the

Digitized by Google

community moveable property to the extent of a certain sum or of a determinate value, they are, by such stipulation alone, presumed to have reserved the remainder.—Pothier, *Com.*, 287, 301, 315, 316, 317, 318, 331 ; 11 Pand. Franç., 15 et seq. ; 2 Rogron, C. C., p. 1829 ; C. N., 1500. [II. 437.]

1386. This clause renders the consort debtor to the community for the amount which he promised to contribute, and obliges him to substantiate such contribution.—Pothier, *Com.*, 287, 288, 289, 290, 296, 302 ; *Intr. tit.* 10, *Orl.*, nn. 40, 45 ; 3 Maleville, 238 et seq. ; 11 Pand. Franç., 26 et seq. ; 2 Rogron, C. C., p. 1830 ; C. N., 1501. [II. 437.]

1387. The contribution is sufficiently substantiated, as regards the husband, by the declaration made in the contract of marriage that his moveable property is of a certain value.

It is sufficiently substantiated, as regards the wife, by the discharge which the husband gives either to her or to those who made the endowment.

If such contribution be not claimed within ten years the wife is presumed to have made it ; saving the right of proving the contrary. —Pothier, *Com.*, 297, 298, 300 ; *Intr. tit.* 10, *Orl.*, n. 45 ; Lebrun, *Com.*, liv. 3, tit. 2, sec. 1, dist. 3, n. 42 ; 1 Bourdon, p. 650 ; 3 Maleville, 239, 240 ; 11 Pand. Franç., 33 et seq. ; 2 Rogron, C. C. p. 1830 ; C. N., 1502. [II. 437 to 439.]

1388. After the dissolution each consort has a right to take back, before partition, out of the property of the community, the value of the moveable property which he brought into it at the marriage or which accrued to him after it, over and above what he bound himself to bring into the community.—Pothier, *Com.*, 319, 325 ; 3 Maleville, 239, 240 ; 12 Pand. Franç., 36 ; 3 Delvincourt, 43 ; 2 Rogron, C. C., 1830 ; C. N., 1503. [II. 439.]

1389. [In the case of the preceding article, the moveable property which accrues to either consort during marriage must be established by an inventory or some other equivalent title.

As regards the husband, in default of such inventory or title, he forfeits his right to take back the moveable property which has fallen to him during the marriage.

As regards the wife, on the contrary, she or her heirs are, in

Digitized by Google

in such case, admitted to make proof either by titles or by witnesses, or even by common rumor, of the moveable property, thus accrued to her.]—Pothier, *Com.*, 300; 3 Maleville, p. 240; 12 Pand. Franç., 39, 40; 2 Rogron, C. C., 1832; C. N., 1504. [II. 439.]

DECISION:—Where goods are seized by a creditor of the husband, and the wife, whose marriage contract excludes community opposes the seizure, claiming the goods as her property, verbal evidence is admitted with reference to goods received by the wife since the marriage.—CASAULT, J.—*L'Hopital Général vs Gingras*, 10 Q. L. R., p. 230.

§ 2. *Of the cause of mobilisation.*

1390. The clause of mobilization is that by which the consorts, or either of them, bring into the community the whole or a portion of their immoveables, whether present or future.—Renusson, *Propres*, c. 6, sec. 1, 3, 8; Pothier, *Com.*, 303; *Intr. tit.* 10, *Orl.*, n. 53, 56; C. N., 1505. [II. 439.]

DECISIONS:—1. That the stipulation of *ameublissement* in a contract of marriage excludes the customary or legal dower.—SUPERIOR COURT (Judge's name not given.)—*Toussaint vs Leblanc*, 1 L. C. R., p. 25.

2. The donation by an ascendant of one of the conjoints, in a marriage contract, of an immoveable destined to enter into the community is an *ameublissement* within the meaning of the law.—Such *ameublissement* has no effect except as regards the community and between the consorts themselves.—The immoveable preserves its quality of *propre* up to the time of the *partage*.—The other conjoint being dead and the child born of the marriage having died without issue and before *partage*, the *ameublissement* has no longer any effect and the collateral heirs of the conjoint in whose favor it was stipulated can claim no rights on such immoveable.—Q. B.—*Charlebois & Headley*, 2 L. C. R., p. 213.

3. The *ameublissement général* stipulated by the father and mother of their minor daughter in a contract of marriage is valid.—Every thing inherited by the wife from her father and mother and all by them given to be *conquêt* of the community, is entirely subject to the disposal of the husband, who may legally sell or hypothecate it.—Upon dissolution of the community and in virtue of the covenant of *reprise d'apport*, the wife is not entitled to claim that which she has got from her father and mother by inheritance or gift, except subject to the mortgages which the husband may have created thereon as the head of the community.—BERTHELOT, J.—*David vs Gagnon*, 14 L. C. R., p. 110.

1391. Mobilization is either general or special.

It is general when the consorts declare their intention of being in community as to all their property, or that all successions falling to them shall belong to the community.

It is particular when they have only undertaken to bring into

Digitized by Google

the community some determinate immoveables,—Pothier, *Com.*, 304, 305 ; *Intr. tit.* 10, *Orl.*, nn. 52, 53. [II. 439.]

DECISION :—A convenant in a marriage contract that " the parties take one " another with the property and rights to each of them respectively belonging and " such as may hereafter accrue of what nature soever, which said property, mo- " veable or immoveable, shall enter into the community " is a covenant of *ameublissement* of all the property belonging to the parties, notwithstanding a subsequent clause of *réalisation*, and consequently the customary dower cannot be claimed out of the husband's *propres*.—C. R.—*Moreau vs Matthews*, 4 L. C. R., p. 436.

1392. Mobilization may be either determinate or indeterminate.

It is determinate, when the consort declares that he brings as moveable into the community, a certain immoveable, either wholly or to the extent of a certain sum. It is indeterminate when the consort simply declares that he brings into the community his immoveables to the extent of a certain sum.—Pothier, *Com.*, 305 ; *Intr. tit.* 10, *Orl.*, nn. 53, 55; Lebrun, *Com.*, liv. 1, c. 5, dist. 2, n. 7 ; C. N., 1506. [II. 439.]

1393. The effect of determinate mobilization is to convert the immoveable or immoveables affected by it into community property, as moveables themselves would be.

When the immoveable or immoveables of the wife are contributed as moveable in whole, the husband may dispose of them as of the other effects of the community and alienate them entirely.

If the immoveable be contributed as moveable only to the extent of a certain sum, the husband cannot alienate it without the consent of his wife; he may however hypothecate it without such consent, but only to the extent of the portion so contributed.—Lebrun, *Com.*, liv. 1, c. 5, dist. 7 ; Pothier, *Com.*, 307, 309, 311 ; *Intr. tit.*, 10, *Orl.*, nn. 53, 55 ; 11 Pand. Franç., 44-5 ; C. N., 1507. [II. 439.]

DECISIONS :—1. Le mari survivant ne peut pas hypothéquer, durant la continuation de sa communauté qui n'est pas demandée par les enfants mineurs, leur part afférente dans un immeuble ameubli par son contrat de mariage, vu que cette part devient propre naissant des enfants qui y succèdent.—Q. B.—*Parent & Lalande*, 15 L. C. J., p. 37.

2. A *propre ameubli* of the wife may, during the community, be effectually hypothecated by the husband, and the wife, even if she have the *clause de reprises* in her favour and although she may renounce the community, cannot defeat such mortgage.—A married woman can legally renounce in favour of a creditor of her husband, her hypothecary rights on the property of her husband and of the community ; and this notwithstanding the provision of the Registry Ordinance

Digitized by Google

declaring that "no married woman shall become security, or incur any liability, "other than as *commune en biens* with her husband, for debts or obligations "entered into by her husband before their marriage or which may be entered "into by her husband during their marriage."—PRIVY COUNCIL.—*Hamel vs Panet*, 2 App. Cas. p.121, 3 Q. L. R., p. 173.

1394. Indeterminate mobilisation does not confer upon the community the ownership of the immoveables affected by it, its effect is merely to oblige the consort who has undertaken it to include in the mass, at the time of the dissolution, some of his immoveables to the extent of the sum which he has promised.

The husband, without the consent of his wife, cannot alienate, in whole or in part, the immoveables subjected to indeterminate mobilization, but he may hypothecate them to the extent of such mobilization.—Pothier, *Com.*, 313; *Intr. tit.*, 10 *Orl.*, n. 55; 3 Maleville, 242-3; 11 Pand. Franç., 49; 3 Delvincourt, 45; 2 Rogron, C. C., pp. 1834 et seq.; C. N., 1508. [II. 441.]

DECISIONS:—1. In the case of a marriage contract with a covenant of *ameublissement* and a clause of *réalisation*, in the event of renunciation of the community by the wife, the widow *séparée de biens* cannot claim by way of *reprise* the enjoyment of the proceeds of the sale of an immoveable property given by the mother to her adopted daughter and her husband during the community, with condition that such property could not be seized, but would serve to procure aliments. The property given by such donation does not become a *propre* of the wife.—Q. B.—*Jarry & Trust and Loan Co.*, 11 L. C. R., p. 7.

2. Everything inherited by the wife from the father and mother and all by them given to be *conquêt* of the community is entirely subject to the disposal of the husband who may legally sell or hypothecate it.—Upon dissolution of the community and in virtue of a covenant of *reprise d'apports* the wife is not entitled to claim that which she has got from her father and mother by inheritance or gift, except subject to the mortgages which the husband may have created thereon as the head of the community.—BERTHELOT, J.—*David & Gagnon*, 14 L. C. R., p. 110.

1395. The consort who has contributed an immoveable as moveable, has a right, when the partition takes place, to retain it, on account of his share, at the price it is then worth, and his heirs have the same right.—Pothier, *Com.*, 310, 712; 12 Pand. Franç., 52; 3 Maleville, 243; 5 Proudhon, *Usufruit*, n. 2664; C. N., 1509. [II. 441.]

DECISIONS:—1. A married woman can claim the value of an immoveable property, sold upon the representatives of her husband, such property having been given to her during the community, notwithstanding the clause of *ameublissement* be in the contract of marriage, provided that there is a stipulation in the contract of marriage that the wife may renounce to the community and take back whatever she brought to it, and notwithstanding the contract of marriage, executed previously to the coming into force of the Act 4 Vict., cap. 30, was never

Digitized by Google

registered, the claim of the wife in such case, being rather in the nature of a right of property than in the nature of an hypothecary right.—C. R.—*Labrecque vs Boucher*, 1 L. C. R., p. 47.

2. The donation by an ascendant of one of the conjoints, in a marriage contract, of an immoveable, destined to enter into the community, is an *ameublissement* within the meaning of the law.—Such *ameublissement* has no effect except as regards the community and between the conjoints themselves. The immoveable preserves its quality of *propre* up to the time of the partage. The other conjoint being dead and the child born of the marriage afterwards dying without issue and before partage, the *ameublissement* has no longer any effect and the collateral heirs of the conjoint in whose favor it was stipulated, can claim no rights in such immoveable.—Q. B.—*Charlebois & Headley*, 2 L. C. R., p. 213.

3. It is not necessary to register contracts of marriage to preserve rights of ownership thereby secured and children, representing their mother, may claim, by right of community, the value of one half of an immoveable, *propre ameubli*, which they have allowed to be sold.—C. R.—*Nadeau vs Dumon*, 2 L. C. R., p. 196.

§ 3. *Of the clause of separation of debts.*

1396. The clause by which the consorts stipulate that they will separately pay their personal debts, obliges them to account to each other respectively, at the time of the dissolution of the community, for such debts as are established to have been paid by the community in discharge of the consort who was liable for them.

This obligation is the same, whether an inventory has been made or not; but if the moveable property brought in by the consorts have not been determined by an inventory or an authentic statement anterior to the marriage, the creditors of either consort without regard to any distinctions that may be claimed, have a right to be paid out of such property, as well as out of all the other property of the community. The creditors have the same right with regard to such moveable property as may have fallen to the consorts during the community, if likewise it have not been determined by an inventory or authentic statement.—Paris, 222; Orléans, 212; Lebrun, *Com.*, liv. 2, c. 3, sec. 4; Renusson, *Com.*, part. 1, c. 11; Pothier, *Com.*, 351, 353, 361, 363, 370, 371, 615; *Cout. d'Orl.*, art. 212; 3 Maleville, 244; 12 Pand. Franç. 53 et seq.; 3 Delvincourt, 46; C. N., 1510. [II. 441.]

DECISION: La clause de séparation de dettes stipulée entre conjoints qui sont communs en biens par leur contrat de mariage, n'est d'aucun effet vis-à-vis des créanciers de la femme, si cette clause n'est pas suivie d'un inventaire des biens que la femme possédait au jour du mariage.—BERTHELOT, J.—*McBean vs Debartzch*, 5 L. C. J., p. 150.

Digitized by Google

1397. When either of the consorts brings into the community a certain sum or a determinate object, such a contribution implies a tacit agreement that it is not encumbered with debts anterior to the marriage, and he must account to the other for all such incumbrances as lessen its value.—Pothier, *Com.*, 352; *Int. tit.* 10, *Orl.*, n. 65; 3 Maleville, 246; 12 Pand. Franç., 61; 3 Delvincourt, 45; C. N., 1511. [II. 441.]

1398. The clause of separation of debts does not prevent interest and arrears which have accrued since the marriage from being chargeable to the community.—Lebrun, *Com.*, liv. 2, c. 3, sec. 4, n. 10; Pothier, *Com.*, 360, 375; 3 Maleville, 246, 247; 12 Pand. Franç., 62; C. N., 1512. [II. 441.]

1399. When the community is sued for the debts of one of the consorts, who is declared by the contract to be free and clear from all debts anterior to the marriage, the other consort has a right to an indemnity, to be taken from the share in the community which belongs to the indebted consort, or from his private property; and in case of insufficiency, such indemnity may be prosecuted, by way of warranty, against the parties who made the declaration that such consort was free and clear.

This right of warranty may even be exercised by the husband during the community, if the debt have originated with the wife; saving, in such case, the right of the warrantor to be reimbursed by the wife or her heirs, after the dissolution of the community.—Lebrun, *Com.*, liv. 2, c. 3, sec. 3, nn. 41, 42; Renusson, *Com.*, part. 1, c. 2, n. 36; Pothier, *Com.*, 365, 378; *Intr. tit.* 10, *Orl.*, nn. 84-5-6; Lacombe, *Com.*, part. 2, sec. 7; 3 Maleville, 247; 12 Pand. Franç., 64, 72; C. N., 1513. [II. 441.]

§ 4. *Of the right given to the wife of taking back free and clear what she brought into the community.*

1400. The wife may stipulate, that in case of renunciation of the community, she shall take back the whole or a part of what she brought into it either before or since the marriage; but such stipulation cannot extend beyond things formally specified, nor to other persons than those who are designated.

Thus, the right of taking back the moveable property brought

Digitized by Google

in by the wife at the time of the marriage, does not extend to similar property accrued to her during the marriage.

Thus, the right given to the wife does not extend to the children; and that given to the wife and to the children, does not extend to her ascendant or collateral heirs.

In all cases, the wife can only take back her contributions after deduction has been made of such of her private debts as have been paid out of the community.—Pothier, *Oblig.*, 63, *Com.*, 379-391, 393-395, 399, 400-1-2, 407-411; *Intr. tit.* 10, *Orl.*, nn. 68, 70, 71, 75; 3 Maleville, 250; 12 Pand. Franç., 73 et seq.; Merlin, Rép., vo. *Renonciation à la com.*, n. 14; C. N., 1514. [II. 443.]

DECISION: See case noted at C. C. 1395, n. 1.—C. R.—*Labrèque vs Fleury*, 1 L. C. R., p. 47.

§ 5. *Of conventional preciput.*

1401. The clause by which the surviving consort is authorized to pretake, before any partition, a certain sum or a certain quantity of moveable effects in kind, does not take effect in favor of the surviving wife who does not accept the community; unless by the contract of marriage such right is reserved to her, even when she renounces.

Excepting the case of such reservation, preciput can only be taken from the mass to be divided, and not from the private property of the predeceased consort.—Pothier, *Com.*, 413, 440, 441, 442, 447, 448, 568; *Intr. tit.* 10, *Orl.*, nn. 77, 79; 3 Maleville, 251-2; 12 Pand. Franç., 94; 3 Delvincourt, 48, 49; 2 Rogron, C. C., p. 1839; Dard, p. 356, note (a); C. N., 1515. [II. 443.]

1402. Preciput is not regarded as a benefit subject to the formalities of gifts, but as a marriage covenant.—Décl. 25 juin 1727; Ord. 1731, art. 21; Pothier, *Com.*, 442; 12 Pand. Franç., 105; 2 Rogron, C. C., p. 1840; C. N., 1516. [II. 443.]

1403. Natural death opens the right to preciput by the sole operation of law.

It does not open by civil death, unless this effect result from the terms of the contract of marriage; and if there be no stipulation concerning it, it remains suspended in the hands of the representatives of the person civilly dead.—Pothier, *Com.*, 443; *Intr. tit.* 10, *Orl.*, n. 78; C. C., 36, § 8; 3 Maleville, 252; 12 Pand. Franç., 106 et seq.; 3 Delvincourt, p. 48; *Contrà*, C. N., 1517. [II. 443.]

Digitized by Google

1404. When the community is dissolved during the lifetime of the consorts in consequence of separation from bed and board or of separation of property only, such dissolution does not, unless the contrary be stipulated, open the right to preciput in favor of either of the consorts. The right remains suspended until the death of the consort who dies first.

In the interval, the sum or the thing which constitutes the preciput remains provisionally with the husband, from whose succession the wife may claim it, if she have survived him.—Pothier, *Com.*, 445, 519; 12 Pand. Franç., 108 et seq.; 3 Delvincourt, 48; Merlin, Rép., vo. *Préciput conventionnel*, § 1, n. 1; 2 Rogron, C. C., p. 1841; C. N., 1518. [II. 443.]

1405. The creditors of the community have always a right to cause the effects comprised in the preciput to be sold; saving the recourse of the consort, conformably to article 1401.—3 Maleville, 252-3; 12 Pand. Franç., 113; 3 Delvincourt. 49; C. N., 1519. [II. 445.]

§ 6. *Of the clauses by which unequal shares in the community are assigned to the consorts.*

1406. The consorts may depart from the equal division established by law, either by giving to the surviving consort or his heirs, only a share in the community less than half, or by giving him only a fixed sum in lieu of all rights in the community, or by stipulating that the entire community, in certain cases, shall belong to the surviving consort, or to one of the consorts solely.—Pothier, *Com.*, 449, 450, 460; *Intr. tit.* 10, *Orl.*, n. 80; 3 Maleville, 253; 12 Pand. Franç., 114, 115; 3 Delvincourt, 49; 2 Rogron, C. C., p. 1843; C. N., 1520. [II. 445.]

DECISION:—Where it was stipulated by the contract of marriage that the wife at the dissolution should have the furniture contained in a certain house therein described and during the marriage the consorts sold this house with the furniture contained therein and bought another and refurnished it, it was held that the wife had no right to the new furniture in the absence of a special agreement to that effect.—MACKAY, *J.*—*Hatchette vs Cahill*, 6 R. L., p. 532.—Q. B.—7 R. L., p. 513.

1407. When it is stipulated that the consort or his heirs shall have only a certain share in the community, as a third, a fourth, the consort whose share is so reduced or his heirs bear the debts of the

Digitized by Google

community only in proportion to the share they take in the assets.—The agreement is void if it oblige such consort or his heirs, to bear a greater share, or if it exempt them from bearing a share of the debts equal to that which they take in the assets.—Pothier, *Com.*, 449 ; 3 Maleville, 254 ; 12 Pand. Franç., 116 et seq. ; 3 Delvincourt, 50 ; C. N., 1521. [II. 445.]

1408. When it is stipulated that one of the consorts or his heirs shall be entitled only to a certain sum in lieu of all rights of community, the clause is a definitive agreement which obliges the other consort or his heirs to pay the sum agreed upon, whether the community be good or bad, or sufficient or not to pay such sum.—*ff Arg. ex lege* 10, *De reg. juris ;* Brodeau sur Louet, M., c. 4 ; D'Argentré sur art. 22, *Bretagne*, glose 4 ; Pothier, *Com.*, 450-452 ; *Intr. tit.* 10, *Orl.*, n. 80 ; Merlin, vo. *Com.*, § 4, n. 7 ; Bourjon, *Com.*, p. 513 ; 3 Maleville, 254 ; 2 Rogron, C. C.. p. 1844 ; C. N., 1522. [II. 445.]

DECISION :—Par suite de la stipulation d'une hypothèque spéciale jusqu'à concurrence d'une somme fixe et certaine, consentie par le mari et son épouse pour ses droits mentionnés dans leur contrat de mariage qui a été enregistré ; elle ne peut réclamer hypothécairement au-delà de telle somme ainsi stipulée.—SMITH, J.—*Demers vs Larocque*, 8 L. C. J., p. 178.

1409. If the clause establishes this definitive agreement with regard to the heirs only of one of the consorts, such consort, if he survive, has a right to the legal partition by halves.—Pothier, *Com.*, 453 ; 3 Maleville, 254 ; 3 Delvincourt, 50 ; 12 Pand. Franç., 119 et seq. ; 2 Rogron, C. C., p. 1844 ; C. N., 1523. [II. 445.]

1410. The husband or his heirs who, in virtue of the clause mentioned in article 1406, retain the whole of the community, are obliged to pay all its debts. The creditors in such case have no action against the wife or against her heirs.

If it be the wife surviving who, in consideration of a stipulated sum, has the right of retaining the whole of the community against the heirs of the husband, she has the option of either paying such sum and remaining liable for all the debts, or of renouncing the community and abandoning to the heirs of the husband both the property and the debts.—Pothier, *Com.*, 55, 57, 58, 60 ; *Intr. tit.* 10, *Orléans*, n. 82 ; 3 Delvincourt, 50 ; 3 Maleville, 255 ; 12 Pand. Franç., 119-127 ; 2 Rogron, C. C., p. 1844 ; C. N., 1524. [II. 445.]

1411. When the consorts stipulate that the whole of the com-

Digitized by Google

munity shall belong to the survivor, or to one of them only, the heirs of the other have a right to take back what had been brought into the community by the person they represent.

Such a stipulation is but a simple marriage covenant, and is not subject to the rules and formalities applicable to gifts.—3 Maleville, 256; 12 Pand. Franç., 128-131; 2 Rogron, C. C., pp. 1845-1847; C. N., 1525. [II. 445 to 447.]

§ 7. *Of community by general title.*

1412. The consorts may establish by their contract of marriage a general community of their property both moveable and immoveable, present and future, or of all their present property only, or of their future property only.—*ff* L. 3, L. 7, *Pro socio;* 3 Maleville, 256; 12 Pand. Frand., 132-139; 2 Rogron, p. 1848; C. N., 1526. [II. 447.]

Provisions common to the articles of this section.

1413. The above articles do not confine to their precise provisions the stipulations of which conventional community is susceptible.

The consorts may make any other covenants, as mentioned in articles 1257 and 1384.—12 Pand. Franç., 140-1; Merlin, Rép., vo. *Noces*, (Secondes), § 7, art. 2, n. 4; C. N., 1527. [II. 447.]

1414. Conventional community remains subject to the rules of legal community in all cases where they have not been implicitly or explicitly departed from by the contract.—5 Toullier, p. 817; 12 Pand. Franç., 141; 3 Delvincourt, 9, 40; C. N., 1528. [II. 447.]

§ 8. *Of covenants excluding community.*

1415. When the consorts stipulate that there shall be no community, or that they shall be separate as to property the effects of such stipulations are as follows:—Pothier, *Com.*, 461, 464; *Intr. tit.* 10, *Orl.*, n. 83; 3 Maleville, 258; 12 Pand. Franç., 142-3; 3 Delvincourt, 51; C. N., 1529. [II. 447.]

1. *Of the clause simply excluding community.*

1416. The clause which declares that the consorts marry without community does not give the wife the right to administer her

Digitized by Google

property, nor to receive the fruits thereof; these are deemed to be contributed by her to her husband to enable him to bear the charges of marriage.—Renusson, *Com.*, part. 1, c. 4, n. 6; Pothier, *Com.*, 461, 462; *Intr. tit.* 10, *Orl.*, n. 83; *Puiss. du mari*, 87; 3 Maleville, 257, 258, 259; 12 Pand. Franç., 144 et seq.; 3 Delvincourt, 52; 2 Rogron, C. C., p. 1849; C. N., 1530. [II. 447.]

DECISIONS:—1. A stipulation of exclusion of community in a marriage contract does not give a wife the same rights as a *séparation de biens contractuelle* and an opposition *afin de distraire* made by a woman under such circumstances cannot have the effect of preventing the sale of her moveable effects seized for a debt contracted by the husband during the marriage.—STUART, J.—*Vézina vs Denis*, 14 L. C. R., p. 415.

2. Lorsque, dans un contrat de mariage, il y a stipulation qu'il n'y aura pas de communauté de biens, que la femme aura la libre administration de ses biens, et que le mari sera seul tenu à la pension et habillement de sa femme et des frais de leur famille, la femme peut, après le décès de son mari, réclamer d'un tiers détenteur cinq années et l'année courante d'arrérages de rente annuelle et viagère à elle dus sur un immeuble acquis par le mari pendant le mariage, quoiqu'elle n'ait jamais rien exigé de sa rente de son défunt mari.—Q. B.—*Filion & Guénette*, 7 R. L., p. 438.

3. Que dans le cas d'exclusion de communauté, le mari n'a que l'usufruit des biens-meubles de sa femme à qui reste la propriété de tous ceux qui ne sont pas fongibles; qu'en conséquence, le mari ne peut les aliéner, ni les créanciers du mari les saisir.—Que sous le régime d'exclusion de communauté, la preuve testimoniale est admise relativement aux meubles acquis par la femme depuis le mariage.—CASAULT, J.—*Hopital Général vs Gingras*, 10 Q. L. R., p. 230.

1417. The husband retains the administration of the moveable and immoveable property of his wife, and as a consequence the right to receive all the moveable property she brings with her, or which accrues to her during the marriage; saving the restitution he is bound to make after its dissolution, or after a separation of property judicially pronounced.—Pothier, *Com.*, 463, *Puis du mari*, 97; 12 Pand. Franç., 147; 3 Delvincourt, 52; C. N., 1531. [II. 447.]

1418. If amongst the moveable property brought by the wife or which accrues to her during marriage, there be things which cannot be used without being consumed, an appreciatory statement must be joined to the contract of marriage, or an inventory must be made of them at the time when they so accrue to her, and the husband is bound to give back their value according to the valuation—*ff* L. 42, *De jure dotium;* 12 Toullier, pp. 553 et seq.; 3 Malleville, 259; 12 Pand. Franç., 147.; 3 Delvincourt, 52; 2 Rogron, C. C., p. 1850; C. N., 1532. [II. 447.]

Digitized by Google

1419. The husband, with regard to such property, has all the rights and is subject to all the obligations of a usufructuary.—*ff* L. 13, L. 15, L. 16, *De impensis in res dot.*; L. 28, § 1, *De donat. inter vir.*; 3 Maleville, 260; 12 Pand. Franç., 148; 3 Delvincourt, 52; 12 Toullier, pp. 553 et seq.; 2 Rogron, C. C., p. 1851; C. N., 1533. [II. 449.]

1420. The clause which declares that the consorts marry without community, does not prevent its being agreed that the wife, for her support and personal wants, shall receive her revenues in whole or in part, upon her own acquittances.—Bourjon, *Com.*, part. 1, c. 2, s. 1, dist. 1, n. 2; Pothier, *Com.*, n. 466; 3 Maleville, 260; 12 Pand. Franc., 149 et seq.; C. N., 1534. [II. 449.]

1421. The immoveables of the wife which are excluded from the community in the cases of the preceding articles are not inalienable.

Nevertheless they cannot be alienated without the consent of the husband, or, upon his refusal, without judicial authorization.—3 Maleville, 260; 12 Pand. Franç., 150-1; 3 Delvincourt, 52; 2 Rogron, C. C., p. 1851; C. N., 1535; [II. 449.]

DECISION:—Que la femme mariée sous le régime d'exclusion de communauté, peut emprunter, avec l'autorisation de son mari, et que l'obligation qu'elle contracte pour le capital et les intérêts n'est pas prohibée par l'article 1301 du Code Civil.—Q. B.—*Ross & Société de Construction Permanente de Québec*, 12 R. L., p. 130.

II. *Of the clause of separation of property.*

1422. When the consorts have stipulated by their contract of marriage that they shall be separate as to property, the wife retains the entire administration of her property moveable and immoveable and the free enjoyment of her revenues.—Lebrun, *Com.*, liv. 3, c. 2, sec. 1, dist. 2, n. 30; Bourjon, liv. 1, part. 4, c. 4, sec. 4, art. 15, 16; Pothier, *Com.*, 464, 465, *Puiss. du mari*, 15, 98; 3 Maleville, 260-1; 12 Pand. Franç., 152-3; 3 Delvincourt, 53; 2 Rogron, C. C., p. 1852; C. N., 1536. [II. 449.]

DECISIONS:—1. Il n'est pas nécessaire que le contrat de mariage soit enregistré pour autoriser la femme séparée de biens à jouir, à part des biens meubles qui lui appartiennent.—MACKAY, J.—*McDonald vs Harwood*, 4 R. L., p. 284.

2. Pour établir la séparation de biens contractuelle, la femme doit stipuler en sa faveur par son contrat de mariage la gestion et administration de ses biens.—C. R.—*Wilson vs Pariseau*, 1 L. C. J., p. 164.

Digitized by Google

1423. Each of the consorts contributes to the expenses of marriage according to the covenants contained in their contract, and if there be none, and the parties cannot come to an understanding upon the subject, the court determines the contributory portion of each consort according to their respective means and circumstances.—Pothier, *Com.*, 464 ; 12 Pand. Franç., 158-9 ; 3 Delvincourt, 53 ; C. N., 1537. [II. 449.]

DECISIONS :—1. Where groceries were bought by a husband separated as to property from his wife, a joint and several judgment will be rendered against husband and wife on proof that the goods were consumed in the common domicile, such goods being necessaries.—MONK, J.—*St Amand vs Bourrette*, 13 L. C. R., p. 238.

2. A promissory note made by a wife, separated as to property from her husband in favor of her husband, and endorsed by him, for groceries and other necessaries of family use purchased by her, is valid.—BADGLEY, J.—*Cholet vs Duplessis*, 6 L. C. J., p. 81.

3. Un mari et une femme séparés de biens sont conjointement et solidairement tenus au paiement de choses nécessaires à la vie, bien qu'elles aient été achetées pendant la communauté.—SMITH, J.—*Paquette vs Limoges*, 7 L. C. J., p. 30.

4. A married woman is not liable for the price of goods, not being necessaries of life, bought by her without the authorization of her husband.—Q. B.—*Danziger & Ritchie*, 8 L. C. J., p. 103.

5. A wife separated as to property from her husband is not liable for butcher's meat purchased by her and consumed by herself and family.—BERTHELOT, J.—*Rousson vs Gauvin*, 13 L. C. J., p. 82.

6. La femme séparée de biens est tenue au paiement des articles nécessaires et indispensables à l'existence et à l'entretien de de sa famille, et qui lui ont été fournis à sa demande.—C. R.—*Robert vs Rombert*, 14 L. C. J., p. 162.

7. A wife *séparée de biens*, is liable not only for the groceries used by the family, but (*semble*) for small sums lent to the husband, and expended by him by marketing for the family. Further she is liable for spirituous liquors used in the house for entertaining friends, as well as for wine and porter ; but she is not liable for a sum loaned to her husband, not used by him for subsistence.—BADGLEY, J.—*Elliott vs Grenier*, 1 L. C. L. J., p. 91.

8. Une femme séparée de biens d'avec son mari, n'est pas responsable du prix de la viande achetée chez un boucher, pour son usage et celui de sa famille. BERTHELOT, J.—*Rousson vs Gauvin*, 1 R. L., p. 86.

9. Un marchand épicier qui a vendu des effets de groceries à une personne insolvable, pour l'usage de sa famille, peut en poursuivre le recouvrement contre la femme séparée de biens.—MACKAY, J.—*Courcelles vs Dubois*, 4 R. L., p. 284.

10. The wife *séparée de biens* will be held jointly and severally liable with her husband for the price of goods obtained by her, notwithstanding that the same were charged to the husband and his note taken in settlement ; such goods being necessaries.—TESSIER, J.—*Léger vs Lang*, 1 Q. L. R., p 223.

11. La femme *séparée de biens* n'est pas responsable *solidairement* avec son mari, d'aucune partie du prix d'effets achetés d'un épicier, bien que *nécessaires à*

Digitized by Google

la vie, si ces effets n'ont pas été achetés par elle-même, en son propre nom et s'ils sont portés au nom seul du mari, dans les livres du marchand.—DORION, J.—*Larose vs Michaud*, 21 L. C. J., p. 167.

12. A wife's property will not be made liable for necessaries supplied for the family without proof of the insolvency of her husband. *Semble* :—That such liability should not be declared on an opposition by the wife to a seizure of her moveables in execution of a judgment against her husband.—TORRANCE, J.—*Laframboise vs Lajoie*, 2 L. C. J., p. 233.

13. If the husband is without means, the creditors may claim from the wife payment of household debts for necessaries supplied after the husband's insolvency.—TORRANCE, J.—*McGibbon vs Morse*, 21 L. C. J., p. 311.

14. A wife separated as to property is not liable for the value of necessaries supplied to the family, where credit is given to the husband and the goods are charged to him in the books of the creditor.—Q. B.—*Hudon & Marceau*, 1 L. N., p. 603, 23 L. C. J., p. 45.

15. Where goods sold and delivered are charged by the seller to the husband and credit is given to him, his wife, separated as to property, will not be held liable. It must be clearly proved that the wife in her own name bought and obtained credit in order to make her liable.—Q. B.—*Paquette & Guertin*, 2 L. N., p. 211.

16. La femme qui a stipulé dans un contrat de mariage qu'elle ne contribuerait pas aux charges du mariage, sera cependant condamnée à payer des effets de groceries achetés par elle-même pour la famille, et lorsqu'il est prouvé qu'elle a souvent promis payer le prix de ces groceries. Une femme séparée de biens n'a pas besoin de l'autorisation de son mari pour acheter des provisions pour la famille.—C. R.—*Garrigan vs Garrigan*, 9 R. L., p. 510.

17. The plaintiff sued for the price of bread supplied to defendant, *séparée de biens*. It was admitted that the bread was delivered to the female defendant at her domicile, to wit, the joint domicile of the defendants; that the price was reasonable; that the bread was consumed by the defendants and their children; that the male defendant was insolvent and unable to provide his wife and children with the necessaries of life. Action was dismissed on the ground that credit had been given to the husband.—CARON, J.—*Bachlaw vs Cooper*, 3 L. N., p. 128.

18. A wife *séparée de biens*, is not liable for the price of necessaries purchased for the family of her husband and herself and charged by the seller to the husband, and especially when the husband has given a note for the price of such necessaries and the wife is sued as endorser *pour aval*.—Q. B.—*Bruneau & Barnes*, 25 L. C. J., p. 245, 3 L. N., p. 300.

19. The wife paid for necessaries for her children, the plaintiff being a butcher and as her husband is admittedley insolvent, the reason of C. C. 1317 applies which says that she must bear the expense alone.—C. R.—*Bénard vs Bruneau*, 5 L. N., p. 112.

20. The wife, *sous puissance du mari et séparée de biens*, buying necessaries for the family, is presumed to act on behalf of the husband, the head of the family, and unless such presumption be rebutted in some way, as, for example, by evidence showing that the husband is insolvent and that the duty of providing for the family devolves exclusively on the wife she will not be held liable for the costs of such necessaries.—C. R.—*Brown vs Guy*, 5 L. N., p. 111.—MACKAY, J.—4 L. N., p. 264.

Digitized by Google

21. Que le mari est tenu de la dette contractée pour les services du médecin rendus à sa femme, même lorsqu'ils sont séparés de biens.—JOHNSON, J.—*D'Orsonnens vs Christin*, 7 L. N., p. 338.

22. Que la femme séparée de biens n'est pas tenue pour les fournitures avancées au mari pendant le mariage pour sa famille.—Q. B.—*Lefaivre & Guy*, 3 Q. B. R., p. 255.

23. A wife *séparée de biens*, who purchases necessaries for the family of her husband and herself, but not in her own name, and which purchases are charged by the seller to the husband, is not liable to the seller for the price of such necessaries. A wife *commune en biens*, who purchases necessaries for the family of her husband and herself, only binds the community and in no way binds herself personally, unless she afterwards accepts the community and then only to the extent of one half, or, where there is an inventory, to the extent she may have profited by the community.—Q. B.—*Hudon & Marceau*, 23 L. C. J., p. 45.

24. Que si une femme, séparée de biens d'avec son mari, achète des effets pour les besoins de la famille, et, si ces effets sont chargés au nom de la femme et à sa connaissance et sans protêt de sa part, et livrés au domicile conjugal, le vendeur a une réclamation contre cette femme pour le paiement de ces effets.—Que si cette femme a fait ses achats, connaissant le mauvais état des affaires de son mari et sans en avertir le vendeur, il y a lieu à lui appliquer les articles 165 et 1317 du Code Civil, et à la tenir responsable pour le paiement de ces effets, même s'il a été stipulé au contrat de mariage que les époux seraient séparés de biens, et que le mari serait tenu de subvenir à l'entretien de la famille et aux besoins du ménage.—Q. B.—*Griffin & Merrill*, 15 R. L., p. 55, M. L. R., 3 Q. B., p. 130.—LORANGER, J.—M. L. R., 1 S. C., p. 335.

See also cases noted at C. C. 1301 and 1317.

1424. The wife cannot in any case, nor by virtue of any stipulation, alienate her immoveables without the special consent of her husband, or, on his refusal, without being judicially authorized.

Every general authorization to alienate immoveables, which is given to the wife either by the contract of marriage or subsequently, is void.—Paris, 223; 1 Soefvre, cent. 4, c. 5; Lapeyrère, cent 1, c. 67; Lebrun, Com., liv. 2, c. 1, sec. 4, n. 8; Pothier, *Com.*, 464, *Puiss. du mari*, n. 98; 3 Maleville, 262-3-4; 12 Pand. Franç., 155; C. N. 1538. [II. 449.]

1425. When the wife who is separated as to property has left the enjoyment of her property to her husband, the latter upon the demand which his wife may make, or upon the dissolution of the marriage, is bound to give up only the fruits which are then existing, and is not accountable for those which, up to such time, have been consumed,—Cod., L. 11, *De pactis conventis*; 3 Maleville, 264; 12 Pand. Franç., 155 et seq.; 2 Rogron, C. C., p. 1853; C. N., 1539. [II. 449.]

Digitized by Google

DECISION :—Lorsque dans un contrat de mariage il y a stipulation qu'il n'y aura pas de communauté de biens, que la femme aura la libre administration de ses biens, et que le mari sera seul tenu à la pension et habillement de sa femme et des frais de leur famille, la femme peut, après le décès du mari, réclamer d'un tiers détenteur cinq années et l'année courante d'arrérages de rente annuelle et viagère à elle dus sur un immeuble acquis par le mari pendant le mariage, quoiqu'elle n'ait jamais rien exigé de sa rente de son défunt mari.—Q. B.—*Filion & Guénette*, 7 R. L., p. 438.

CHAPTER THIRD.

OF DOWER.

SECTION I.— GENERAL PROVISIONS.

1426. There are two kinds of dower, that of the wife and that of the children.

These dowers are either legal or customary, or prefixed or conventional.—2 Laurière sur Paris, 251 et seq. ; 2 Argou, 126 ; Pothier, *Douaire*, 1, 2. [II. 451.]

1427. Legal or customary dower is that which the law, independently of any agreement, and as resulting from the mere act of marriage, establishes upon the property of the husband, in favor of the wife as usufructuary, and of the children as owners.—Paris, 247, 263 ; 2 Argou, 129 ; Pothier, *Douaire*, 2, 291 ; 12 Pand. Franç.. 165, 166. [II. 451.]

DECISIONS :—1. The stipulation of *ameublissement* in a contract of marriage excludes the legal or customary dower.—SUPERIOR COURT (Judge's name not given)—*Toussaint vs Leblanc*, 1 L. C. R., p. 25.

2. Dower stipulated in a marriage contract to be "such as is established by the laws of Lower Canada," is legal and customary dower and not *douaire préfix*. —MONK, J.—*Sims vs Evans*, 4 L. C. J., p. 311.

3. The right of dower is regulated by the law of the place where the immoveable is situate, and therefore accrues to the wife on an immoveable in the Province of Quebec, although the consorts may have been domiciled, at the time of the marriage, in England, by the law of which country dower would not accrue. Q. B.—*Erichsen & Cuvillier*, 3 L. N., p. 285, 25 L. C. J., p. 80.

4. Que le créancier antérieur ou douaire peut faire saisir et vendre l'immeuble affecté au douaire.—C. R.—*Laberge vs Laberge*, 10 L. N., p. 153.

5. Que lorsqu'un douaire coutumier a été enregistré (C. C. 2116) sur un immeuble, une créance ayant la priorité de date et d'origine, mais enregistrée sur le même immeuble subséquemment au dit douaire, ne constitue pas "une créance

Digitized by Google

antérieure ou préférable," purgeant le douaire coutumier, dans le sens de l'article 710 C. P. C. qui n'a trait qu'à l'antériorité de rang, et à la préférence à raison d'un privilège en vertu des lois règlant les privilèges, les hypothèques et l'enrégistrement des droits sur les immeubles.—C. R.—*Lizotte vs Deschesneau*, M. L. R., 1 S. C., p. 402.—Q. B.—31 L. C. J., p. 80.

1428. Prefixed or conventional dower is that which the parties have agreed upon, by the contract of marriage.—Paris, 255; 2 Laurière, 272 et seq.; 2 Prevot de la Jannès, 134; Pothier, *Douaire*, 2. [II. 451.]

1429. Conventional dower excludes customary; it is however lawful to stipulate that the wife and the children shall have the right to take either the one or the other, at their option.—Paris, 261; 2 Laurière, 285; 2 Prevot de la Jannès, 126; 2 Argou, 128, 142; Pothier, *Douaire*, 138. [II. 451.]

1430. The option made by the wife, after the opening of the dower, binds the children, who must remain satisfied with whichever dower she has chosen.

If she die without having made the choice, the right of making it passes to the children.—Paris, 261; 2 Laurière, 286; 2 Argou, 142; Pothier, *Douaire*, 321. [II. 451.]

1431. If there be no contract of marriage, or if in that which has been made the parties have not explained their intentions on the subject, customary dower accrues by the sole operation of law.

But it is lawful to stipulate that there shall be no dower, and such a stipulation binds the children as well as the mother.—Paris, 247; 2 Prevot de la Jannès, 127; Renusson, *Douaire*, c. 4, n. 12; Pothier, *Douaire*, nn. 3, 5, 151. [II. 451.]

1432. Dower whether conventional or customary is not regarded as a benefit subject to the formalities of gifts, but as a simple marriage covenant.—Pothier, *Douaire*, 292 et seq.; 12 Pand. Franç., 163. [II. 451.]

1433. The right to conventional dower accrues from the date of the contract of marriage, and the right to customary dower from the date of the celebration, or from the date of the contract if there be one in which it is stipulated.—Loysel, *Douaire*, règle 20; 2 Lau-

Digitized by Google

rière, 256; Renusson, *Douaire*; Pocquet, 224; Pothier, *Douaire*, 147; 12 Pand. Franç., 164. [II. 451.]

1434. Customary dower consists in the usufruct for the wife, and the ownership for the children, of one half of the immoveables which belong to the husband at the time of the marriage, and of one half of those which accrue to him during marriage from his father or mother or other ascendants.—Paris, 248; 2 Prevot de la Jannès, 122-3; 2 Laurière, 255 et seq.; 2 Argou, 130; Pothier, *Douaire*, 12. [II. 451.]

DECISIONS:—1. Under the 37th section of the Act 4 Vict., cap. 30, the dower to which children are entitled attaches to lands, tenements, etc., in the possession of their father at the time of his decease; to lands, tenements, etc., which have been in the possession of the father and in relation to which the mother has not barred or released her dower under the provisions of the 35th section of the statute above cited.—STUART, J.—*Adams vs O'Connell*, 11 L. C. R., p. 365.

2. L'insolvabilité du mari, au jour des épousailles, n'empêche pas les immeubles qu'il possédait alors de devenir sujets au douaire coutumier.—BERTHELOT, J.—*Filion vs DeBeaujeu*, 5 L. C. J., p. 128.

3. A universal legatee cannot reclaim from a particular legatee her dower upon an immoveable property which forms the object of the particular legacy.—JOHNSON, J.—*Kirby vs Ross*, 5 R. L., p. 453.

4. Que le douaire coutumier existe, non seulement sur les immeubles que le père avait lors de son mariage et qu'il n'a pas aliénés, mais encore sur ceux qu'il a aliénés, si la mère des douariers n'a pas renoncé à son douaire, tant pour elle que pour ses enfants.— Q. B.—*Betournay & Moquin*, 2 Q. B. R., p. 187.

1435. Immoveables which the husband has contributed as moveable under a clause of mobilization, in order to bring them into the community, are not subject to customary dower.

Neither are immoveables by fiction, composed of moveable objects which the husband has reserved to himself by the clause of realization in order to exclude them from the community.—2 Prevot de la Jannès, 127; Pocquet, règle 18, p. 223; Renusson, *Douaire*, c. 3, nn. 9, 106; Lacombe, vo. *Douaire*, sec. 2, nn. 7, 22; Lebrun, *Suc.*, liv. 2, c. 5, dist. 1, n. 21. [II. 451.]

DECISIONS:—1. A covenant in a marriage covenant that "the parties take "one another with the property and rights to each of them respectively belong- "ing and such as may hereafter accrue of what nature soever, which said pro- "perty, moveable or immoveable shall enter into the community," is a covenant of *ameublissement* of all the property belonging to the parties, notwithstanding a subsequent clause of *réalisation*, and consequently the customary dower cannot be claimed out of the husband's *propres*.—C. R.—*Moreau vs Mathews*, 5 L. C. R., p. 325.

2. See case noted at C. C. 1427 n. 1.—*Toussaint & Leblanc*, 1 L. C. R., p. 25.

Digitized by Google

1436. The customary dower resulting from a second marriage, when there are children born of the first, consists in a half of the immoveables, not affected by the previous dower, which belong to the husband at the time of the second marriage, or which accrue to him during such marriage from his father or mother or other ascendants.

The rule is the same for all subsequent marriages which the husband may contract, when there are children of the previous marriages.—Paris, 253, 254 ; 2 Argou, 136 ; Renusson, *Douaire*, c. 11, nn. 1 et seq. ; Pothier, *Douaire*, 4, 5. [II. 453.]

DECISION :—Le douaire des enfants d'un second mariage ne doit consister que dans le *quart* des immeubles acquis pendant la première communauté, quoique par l'effet du partage de la première communauté fait après le second mariage, le mari soit devenu propriétaire de la totalité de l'immeuble grevé du douaire : dans ce cas le partage n'aura pas un effet rétroactif de manière à changer la quotité du douaire. L'article 279 de la Coutume de Paris ne s'applique pas au douaire coutumier d'une seconde femme et des enfants d'un second mariage.—BERTHELOT, J.—*Filion vs De Beaujeu*, 5 L. C. J., p. 128.

1437. Conventional dower, when there is no agreement to the contrary, also consists in the usufruct for the wife, and the ownership for the children, of the portion of the moveable or immoveable property which constitutes it according to the contract of marriage.

The parties may, however, modify this dower at will ; they may stipulate, for example, that it shall belong to the wife in full ownership, to the exclusion of the children, and without return, or that the dower of the latter shall be different from that of their mother.—2 Prevot de la Jannès, 134 ; 2 Argou, 127, 128 ; Renusson, *Douaire*, c. 4, nn. 1 et seq. ; 12 Pand. Franç., 165, 166. [II. 453.]

DECISION :—La convention dans un contrat de mariage que, "au lieu de "douaire, la femme en cas de suivie à son mari, recevra pendant sa vie les intérêts "de.....dont leurs enfants auront la propriété et à défaut les héritiers du mari," participe de la nature d'un douaire préfix, et est régie par les mêmes lois.—C. R.—*Morisson vs Sauvageau*, 4 R. L., p. 455.

1438. Dower, whether customary or conventional, is a right of survivorship which opens by the natural death of the husband.

It may however be opened and become exigible by the civil death of the husband, or by separation from bed and board, or separation of property only, if such effect result from the terms of the contract of marriage.

It may likewise be demanded in the case of the absence of the husband, under the circumstances and conditions expressed in articles

Digitized by Google

109 and 110; Paris, 163; 2 Prevot de la Jannès, 124; Brodeau et Louet, D, c. 35; Montholon, *Arrêt* 63; 1 Despeisses, part. 1, tit. 13, sec. 5; 2 Bretonnier sur Henrys, liv. 4, quest. 1; Renusson, *Douaire*, c. 5, nn. 40 et seq.; 3 Argou, 129, 130; Lacombe, vo. *Douaire*, art. 9, nn. 1, 2; Lamoignon, tit. 34, art. 4; 12 Pand. Franç., 167; C. C., 36, § 8, 1403. [II. 453.]

DECISIONS:—1. Le prédécès seul du mari donne lieu à l'ouverture du douaire de la femme, à moins d'une stipulation très formelle et d'une renonciation très expresse aux dispositions de la Coutume de Paris.—Q. B.—*Mercier & Blanchet*, 1 R. de L., p. 122.

2. L'immeuble du défendeur avait été saisi à la poursuite des demandeurs. Il était affecté au douaire coutumier non encore ouvert en faveur des enfants nés du mariage du défendeur avec feu Clémence Racicot. François Perrin, comme tuteur des enfants, forma opposition afin de charge du droit au douaire coutumier. L'opposition ne fut pas contestée. Mais par jugement du 19 octobre 1838, la Cour du Banc du Roi de Montréal la débouta sur le principe que le douaire n'était pas encore ouvert.—K. B.—*Robertson vs Perrin*, 1 R. de L., p. 288.

3. An *adjudicataire* may, under some circumstances, be permitted to retain the capital of a dower *non encore ouvert*.—K. B.—*Roberts vs Lavaux*, 2 R. de L., p. 278.

4. Le douaire préfix a lieu et la femme peut le réclamer lorsque la communauté de biens se dissout par la séparation judiciaire, et qu'il a été stipulé par le contrat de mariage que le douaire aurait lieu et que la femme aurait le droit de le réclamer, "arrivant la dissolution de la communauté par mort ou autrement." —Loranger, J.—*Parent vs Tonnancour*, 1 R. L., p. 50.

5. La femme du failli n'a pas le droit de réclamer une somme stipulée en sa faveur, par son contrat de mariage, de la nature d'un douaire et d'un gain de survie, sur la masse des biens de son mari en faillite.—C. R.—*Morrison vs Simpson*, 3 R. L., p. 422, 1 R. C., p. 243.

6. Patrick Leslie, on the 28th April 1857, signed a contract of marriage with Marie Elmire Delisle, containing the following clause: — "And in consideration "of the said intended marriage and that there shall be no community of property "(*communauté de biens*), between the said parties, the said Patrick Leslie hath "given and granted, and by these presents he doth give and grant unto the said "Marie Elmire Delisle, his intended wife, accepting the same in lieu of dower, "and of every other matrimonial right, claim, pretension and demand whatsoever, "the sum of four thousand pounds current money of this Province, which said "sum shall be paid by the heirs, executors or administrators of the said Patrick "Leslie, as soon after his decease as circumstances shall permit, to the said Marie "Elmire Delisle, and their lawful issue by the said intended marriage, in case the "said Marie Elmire Delisle shall marry the said Patrick Leslie and not other-"wise."—The marriage took place and Patrick Leslie having become insolvent and his moveables having been sold by the sheriff, his wife, Marie Elmire Delisle, claimed by her opposition to be paid out of the moneys levied by the sheriff, the total amount of her claim of four thousand pounds, unless the creditors should give security that on the death of Patrick Leslie, in case she survived him, she would be paid the said sum.—*Held*: That the demand of the wife could not be

Digitized by Google

maintained according to the maxim "*jamais mari ne paya douaire.*"—BADGLEY, J.—*Masson vs Leslie*, 10 L. C. J., p. 233.

7. La convention dans un contrat de mariage que "au lieu de douaire, la "femme, en cas de survie à son mari, recevra pendant sa vie les intérêts de..... "dont leurs enfants auront la propriété et à défaut les héritiers du mari," participe de la nature d'un douaire préfix et est régie par les mêmes lois.—Ce droit est soumis à la condition de survie absolument et ne peut être réclamé du vivant du mari, même en cas de faillite de celui-ci.—Les lois françaises qui régissent le douaire ou matière y participant, ne peuvent être changées par les lois passées par le Parlement Fédéral et particulièrement par les lois de Faillite.—C. R.—*Morrison vs Sauvageau*, 4 R. L., p. 455.

8. A right given to an intended wife by a contract of marriage, in case she survive her intended husband, to the legal interest of one third of the property and assets belonging to his "succession and estates," cannot be exercised during the life-time of the husband against the property and estates assigned by him under the Insolvent Act of 1875.—Q. B.—*Workman & Renny*, 23 L. C. J., p. 324, 2 L. N., p. 82, 10 R. L., p. 412.

1439. If the wife be alive at the time of the opening of the dower, she enters immediately upon the enjoyment of her usufruct; the children cannot take possession of the property until after her death.

If the wife die first, the children enjoy the dower as owners from the moment of its opening.

Where the wife dies first, if at the death of the husband no children or grandchildren issue of the marriage be living, the dower is extinguished and the property remains in the succession of the husband.—Paris, 263, 265; 2 Laurière, 272, 287 et seq; Pocquet *Douaire*, règle 8, p. 219; Loysel, *Douaire*, règle 6; 2 Argou, 130, 142, 145, 146; Lamoignon, *Douaire*, art. 32, 34; 12 Pand. Franç., 174. [II. 453.]

1440. Conventional dower is taken from the private property of the husband.—Paris, 257, 260; 2 Laurière, 281; 2 Prevot de la Jannès, 135; 2 Argou, 140; Lamoignon, *Douaire*, art. 35. [II. 453.]

DECISION:—Un légataire universel ne peut réclamer du légataire particulier un douaire attaché sur l'immeuble qui fait l'objet du legs particulier.—JOHNSON, J.—*Kirby vs Ross*, 5 R. L., p. 453.

1441. The wife and the children are seized of their respective rights in the dower from the time it opens, without the necessity of a judicial demand; such a demand is however necessary against subsequent purchasers, in order to give rise, as regards them, to the fruits of the immoveables and the interest of the capital sums, which they have acquired in good faith, and which are subject to or charged

Digitized by Google

with dower.—Paris, 251, 252, 256; 2 Laurière, 280; Pocquet, règle 10, p. 220; 2 Argou, 132-3; Loysel, *Douaire*, règle 10; Pothier, *Douaire*, 189, 332; Lamoignon, *Douaire*, art. 9. [II. 453.]

DECISIONS:—1. La renonciation faite par une femme à la succession testamentaire de son mari, ne sera pas affectée par le fait que, comme exécutrice du testament, elle aura reçu une somme d'argent qu'elle se serait appropriée, en déduction de son douaire préfix.—MACKAY, J.—*Ackerman vs Gauthier*, 4 R. L., p. 224.

2. Qu'une femme qui, sans mise en demeure préalable, poursuit en réclamation de son douaire coutumier, un tiers possesseur de bonne foi d'un immeuble affecté à ce douaire, n'a droit aux fruits et revenus de l'immeuble qu'à partir de l'institution de l'action, et que, dans l'espèce, l'action n'étant que pour arrérages des fruits et revenus, a été déboutée.—TASCHEREAU, J.—*Lamirande vs Lalande*, M. L. R., 4 S. C., p. 55.

1442. Customary dower, and conventional dower when it consists of immoveables, is a real right, and is governed by the law of the place where the immoveables subject to it are situated.—Paris, 249; 2 Prevot de la Jannès, 128, 129; 2 Laurière, 260; 2 Argou, 133. [II. 453.]

DECISION:—Customary dower is a real right and is governed by the law of the place where the real property of the husband is situate, and not by the law of his domicile at the time of his marriage or of the place where the marriage was celebrated.—Q. B.—*Erichsen & Cuvillier*, 25 L. C. J., p. 80, 3 L. N., p. 285.

1443. Neither the alienation by the husband of immoveables subject to or charged with dower, nor the charges or hypothecs which he may have imposed upon them, either with or without the consent of his wife, affect in any manner the rights of the latter or of the children, unless she has expressly renounced in conformity with the following article.

Such alienation and charges are equally without effect, as regards both the wife and the children, even when made in the name and with the consent of the wife, although she be authorized by her husband; subject to the same exception.—Paris, 249, 250; 2 Laurière, 260; 2 Prevot de la Jannès, 130; 2 Argou, 145; Pocquet, 225; Lamoignon, *Douaire*, art. 5; C. C., 1301. [II. 455.]

DECISIONS:—1. L'action hypothécaire pour douaire préfix ne peut pas être repoussée par une exception alléguant que le demandeur est tenu de s'adresser d'abord au dernier acquéreur et ainsi de suite, en remontant jusqu'au premier. Cette exception ne peut être invoquée qu'à l'égard du douaire coutumier.—C. R.—*Benoit vs Tanguay*, 1 L. C. J., p. 168.

2. Dans une action pour douaire coutumier des enfants, intentée contre un tiers détenteur, s'il n'a pas été allégué par les demandeurs que leur père n'a pas

Digitized by Google

laissé dans sa succession d'héritages de valeur suffisante pour leur fournir leur douaire, le défendeur ne peut faire rejeter la demande des douariers, en se fondant sur cette simple omission ; il faut qu'il allègue par exception et prouve que le père a laissé dans sa succession des biens sujets au douaire d'une valeur suffisante pour y satisfaire. Cette insuffisance des allégués de la déclaration doit être attaquée par exception péremptoire ; on ne peut s'en prévaloir efficacement par une simple défense en droit, ni *de plano*, lors de l'audition.—LORANGER, J.—*Lepage vs Chartier*, 2 L. C. J., p. 29.

3. Heirs joined in a deed of sale of an immoveable pertaining to the succession of their father. They afterwards claimed customary dower on an immoveable which had been disposed of by their father during his life-time, without the wife having renounced her dower thereon.—*Held* :—That this immoveable would have been subject to dower if the heirs had renounced the succession, but the fact that the heirs joined in the deed of sale first mentioned was equivalent to a declaration of their acceptance of the succession and excluded their right to customary dower.—Q. B.—*Betournay & Moquin*, 5 L. N., p. 327, 2 Q. B. R., p. 187.

1444. The wife who is of age may however renounce her right of dower, whether customary or conventional, upon such immoveables as her husband sells, alienates or hypothecates.

This renunciation may be made either in the act by which the husband sells, alienates or hypothecates the immoveable, or by a separate and subsequent act.—C. S. L. C., ch. 37, sec. 52, § 1, sec. 54 ; 25 Victoria (1862), ch. 11, sec. 8. [II. 455.]

DECISIONS :—1. A married woman, still a minor, may under the authority of her husband only, ratify a deed of exchange made by the husband of a property liable to her *douaire préfix* and matrimonial rights, such rights being of a moveable character only. The authority of the husband for the purpose of this deed of ratification is sufficiently apparent by the declaration of the wife that she is "*dûment assistée et d'abondant autorisée*," without stating by whom, the husband being a party to the deed and declaring after the reading thereof that he cannot sign.—Upon a deed of exchange in like cases there cannot be *lésion* with respect to the wife, the mortgage for her matrimonial rights being transferred from one property to the other.—Q. B.—*Métrisée & Brault*, 10 L. C. R., p. 157, 4 L. C. J., p. 60.

2. The 4th Vic., c. 3, s. 36, does not prohibit a wife from renouncing to the exercise of her hypothec for matrimonial rights in property sold by her husband, and such renunciation is valid and binding though subsequently she obtains a *séparation de biens* from her husband.—Q. B.—*Gorgendière & Thibaudeau*, 1 R. C., p. 478.

3. A wife may legally renounce to dower, under authority of a judge when her husband is interdicted for insanity.—Q. B.—*Dufresnay & Armstrong*, 14 L. C. J., p. 253.

4. Que la femme peut renoncer en faveur du créancier de son mari, non seulement à son douaire, mais encore à tous droits hypothécaires qu'elle possède sur les biens de son mari.—Qu'une cession par la femme de sa priorité d'hypo-

Digitized by Google

thèque sur les biens de son mari, en faveur du créancier de son mari, est légale, et ne constitue pas une obligation de la femme en faveur de son mari.—JETTÉ, J. *Homier vs Renaud*, 3 L. N., p. 330, 24 L. C. J., p. 253.

5. A wife may legally renounce her priority of hypothec for her *reprises matrimoniales* in favor of a third party lending money to her husband on the security of his real estate, and such renunciation, when made in favor of a third party, does not deprive the wife of her rights against other mortgage creditors inferior in rank to herself.—JETTÉ, J.—*Hogue vs Dupuy*, 23 L. C. J., p. 276, 2 L. N., p. 308.

6. A husband may execute a valid hypothec in favor of his wife on his immoveable property, in lieu of an hypothec which she had by her contract of marriage, to secure a sum of money brought by her at the marriage and reserved as *propre* by her contract of marriage. (Judgment in the preceding case confirmed.)—Q. B.—*Société de Construction Montarville & Cousineau*, 3 L. N., p. 329.

7. Where the wife agrees to renounce her right to dower on property for a valuable consideration received by her, such renunciation is binding on her although it be not expressly made in the form prescribed by C. C. 1444.—Q. B.—*Erichsen & Cuvillier*, 3 L. N., p. 285, 25 L. C. J., p. 80.

See also cases noted at C. C. 1265.

1445. Such renunciation has the effect of discharging the immoveable affected by dower from any claim which the wife may have upon it under that title, and neither she nor her heirs can exercise against any other property of the husband any recourse to be indemnified or compensated for the right thus abandoned ; notwithstanding the provisions of this title or any other provisions of this code respecting the replacements, indemnities or compensations which consorts or other parties owe to each other in cases of partition.—C. S. L. C., c. 37, sec. 52, § 2 ; C. C., 1303. [II. 455.]

DECISIONS:—1. A woman who has obtained a *séparation de biens* cannot exercise any mortgage for her matrimonial rights upon the property sold by her husband if she have, pending the community, approved and ratified the deed of alienation.—Q. B.—*Boudria & McLean*, 12 L. C. R., p. 135.

2. A general renunciation for consideration by a wife *séparée de biens* in 1828, of all rights she might have in a property sold by her husband, and which at the time was hypothecated for the payment to her of a *douaire préfix*, did not operate as a bar to her children's claim to be paid such dower, when the same became open. A sale of the property, under the bankruptcy laws in force in 1845, did not purge the property from the dower, not then open.—Q. B.—*Massue & Morley*, 14 L. C. J., p. 308.

1446. As to the dower of the children, it can be exercised only upon immoveables subject to the dower of their mother which have not been alienated or hypothecated by their father during the continuance of the marriage with her renunciation made in the manner prescribed in article 1444.—C. S. L. C., c. 37, sec. 53. [II. 455.]

Digitized by Google

Children who have attained the age of majority may, after the death of their mother, renounce their dower in all cases in which the latter could have done so herself, and in the same manner and with the same effect.—[III. 383.]

DECISIONS :—1. Une réunion au domaine ou rétrocession volontaire faite pour cause d'inexécution des clauses du contrat de concession originaire, n'a pas l'effet de purger l'immeuble ainsi réuni au domaine ou rétrocédé, du douaire coutumier dont il était grevé.—BERTHELOT, J.—*Filion vs DeBeaujeu*, 5 L. C. J., p. 128.

2. Under the 37th section of the Act 4 Vict., cap. 30, the dower to which children are entitled attaches to lands, tenements, &c. in the possession of their father at the time of his decease and to lands, tenements, &c. which have been in the possession of the father and in relation to which the mother has not barred or released her dower under the provisions of the 35th. section of the statute above cited.—STUART, J.—*Adams vs O'Connell*, 11 L. C. R., p. 365.

1447. Sales under execution, judgments in confirmation of title, and adjudications in forced licitations, when they take place before the opening of the customary dower, whether such dower results from the law alone, or has been stipulated, do not affect immoveables subject to dower.

Nevertheless if the sale under execution take place at the suit of a creditor whose claim is anterior and preferable to the dower, or if such creditor be collocated upon any of the said proceedings, the alienation or the confirmation is valid and the immoveable is discharged. The creditors whose claims rank subsequently, who in such case receive the surplus of the price, are bonnd to bring it back if the dower accrues and cannot receive the moneys without giving security if the dower be apparent upon the proceedings.

When, as in the first case mentioned in this article, the dower is not extinguished by the sale or the judgment of confirmation, the party to whom the property has been adjudicated or who has obtained the judgment may likewise, when he has been evicted, oblige the creditors who have received the price to bring it back, and if the dower appear upon the proceedings, the creditors are not collocated unless they give security to bring back whatever portion of the dower they may receive. If the creditors refuse to give security the person to whom the property is adjudicated keeps or takes back the amount subject to dower, upon giving security himself that he will repay.

Customary dower when open does not fall under the rules of this article.—C. S. L. C., ch. 37, ss, 1 et seq.; C. S. C., 25 Vict., ch. 11, ss. 2, 3, 4; Loysel, *Douaire*, art. 7, 8; 2 Argou, 146, 147; Brodeau et Louet, D, n. 20; Renusson, ch. 10, nn. 1 et seq,; Bacquet, *Droits de*

Digitized by Google

Justice, c. 15, n. 72 ; Lacombe, vo. *Décret*, 153, 154 ; Lamoignon, *Douaire*, art. 20, 21, 22, 23. [II. 455.]

DECISIONS :—It is not necessary that a marriage contract containing a stipulation of the customary dower should be registered, to confer upon the person claiming such dower a right of preference to posterior creditors who have registered their claims.—Q. B—*Sims & Evans*, 10 L. C. R., p. 301.

2. The *douaire coutumier* does not affect a mere undivided interest or share in real property, where such property is sold by *licitation forcée*, the effect of the licitation being to convert the right of dower on the land to a claim on the moneys resulting from the sale of the property ; and this even in the case of a *tiers acquéreur*.—MONK, J.—*Denis vs Crawford*, 7 L. C. J., 251.

3. A wife *séparée de biens*, may legally renounce to the customary dower of herself and children after the property affected with the dower has been sold *par décret*.—Q. B.—*Dufresnay & Armstrong*, 14 L. C. J., p. 253.

1448. If the dower which is not yet open be the conventional dower, whether it consists in an immoveable or in an hypothecary claim, it is subject to the effect of the registry laws, and is extinguished by the sale under execution and the other proceedings mentioned in the preceding articles as in ordinary cases ; saving to the parties interested their rights and recourse and the securities to which they may be entitled.

Conventional dower when open is subject to the ordinary rules. —C. S. L. C., ch. 37, ss. 1 et seq, ; C. S. C., 25 Vict., ch. 11, ss. 2, 3, 4. [II. 457.]

DECISIONS :—1. Une femme mariée n'a pas perdu son hypothèque sur les biens de son mari, quoique son contrat de mariage, antérieur à l'ordonnance des bureaux d'enregistrement, n'ait pas été enregistré avant le 1er novembre 1844, mais ne l'ait été que le 7 décembre 1846.—K. B.—*Ex parte*, Gibb, 3 R. de L., p. 478.

2. A purchaser in good faith for valuable consideration under a deed of sale prior to the registry ordinance and registered previous to the 1st November 1844, is not liable hypothecarily for a *douaire préfix* under a marriage contract before Notaries of 1817 not registered until 14th. February 1853, notwithstanding that the death of the Plaintiff's husband took place in October 1852.—C. R.—*Forbes vs Legault*, 6 L. C. R., p. 100.

1449. The purchaser of an immoveable which is subject to or hypothecated for dower, cannot prescribe against either the wife or the children so long as such dower is not open.

Prescription runs against children of full age, during the lifetime of their mother, from the period when the dower opens.—Renusson, *Douaire*, c, 15 ; 2 Argou, 148, 149 ; Lacombe, vo *Douaire*, 244 ; Pothier, *Douaire*, no 86 ; Paris, 117 ; Lamoignon, *Douaire*, art. 16. [II. 457.]

Digitized by Google

DECISION :—The heir at law of a person who has acquired an immoveable burthened with customary dower for a husband and wife during marriage acquires the prescription of ten years reckoning from the decease of the father and mother of the *douarières*. The payment made under a judgment obtained in favour of one of the *douarières* by the proprietors of the immoveable burthened with the dower does not interrupt the prescription with respect to other portions of the dower not claimed and such payment is not equivalent to renunciation of the prescription which may already have been acquired.—TASCHEREAU, J.—***Bisson vs Michaud***, 12 L. C. R.. p. 214.

SECTION II.—PARTICULAR PROVISIONS AS TO THE DOWER OF THE WIFE.

1450. The conventional dower of the wife is not incompatible with a gift of usufruct made to her by the husband ; she enjoys under such gifts the property comprised in them, and takes her dower from the remainder, without diminution or confusion.—Paris, 257 ; 1 Laurière, 192 ; 2 Laurière, 281 ; Loysel, *Douaire*, règle 15 ; Pocquet, 221 ; Ricard, sur art. 261 de Paris ; 2 Argou, 140 ; Pothier, *Douaire*, 264 et seq ; Lamoignon, *Douaire*, art. 35. [II. 457.]

1451. If the dower of the wife consist in money or rents, the wife, in order to obtain payment of it from the heirs and representatives of her husband, has all the rights and actions which belong to the other creditors of the succession.—Pothier, *Douaire*, 194 ; Lamoignon, *Douaire*, art. 15. [II. 457.]

1452. If the dower consist in the enjoyment of a certain portion of the property of the husband, a partition must be effected between the wife and the heirs of the husband, by which she receives the portion which she has a right to enjoy.

The widow and the heirs have reciprocally an action to obtain this partition, in the case of refusal on the part of either.—Loysel, *Douaire*, règle 21 ; Pocquet, règle 20, p. 224 ; Pothier, *Douaire*, 174 et seq ; 12 Pand. Franç., 169. [II. 457.]

DECISION :—An action *en délivrance de douaire coutumier* is an action of *partage*, and all the co-heirs must therefore be parties to the suit.—K. B.—***Turcot vs Drouin***, 2 R. de L., p. 278.

1453. The dowager, like other usufructuaries, has a right to the natural and industrial fruits attached by branch or root to the immoveable subject to dower when such dower opens, without being obliged to refund the expenses incurred by the husband in order to produce them.

Digitized by Google

The same rule applies to those who enter into the enjoyment of the ownership of such immoveable, after the extinction of the usufruct.—Pothier, *Douaire*, 201, 272, 273; Lamoignon, *Douaire*, art. 14; C. C., 450. [II. 457.]

1454. The dowager, as long as she remains a widow, enjoys the dower, whether customary or conventional, upon giving the security of her oath to restore it; but, if she remarry, she is bound to give the same security as any other usufructuary.—Paris, 264; 2 Argou, 132; Pothier, *Douaire*, 221; Lamoignon, *Douaire*, art. 36. [II. 457.]

DECISION:—An action for dower may be maintained by a widow after her second marriage, but she is bound to give security as required by the 264th article of the custom.—K. B.—*Elot vs Touchette*, 2 R. de L., p. 277.

1455. If the wife who has remarried cannot give the necessary security, her usufruct becomes subject to the provisions of articles, 465, 466 and 467.—Pothier, *Douaire*, 227; Lamoignon, *Douaire*, art. 36, 37, 38; C. C., art. 465, 466, 467. [II. 459.]

1456. The dowager is bound to maintain the leases made by her husband subject to her dower, provided there has been no fraud nor excessive anticipation.—Pocquet, règle 25, p. 227; Renusson, *Douaire*, c. 14; Coquille, quest. 156; Pothier, *Douaire*, 229; Lamoignon, *Douaire*, 45; C. C., 457. [II. 459.]

1457. Leases made by her during the term of her enjoyment expire with her usufruct; nevertheless, the farmer or lessee has a right, and may be obliged, to continue in occupation during the remainder of the year which had begun when the usufruct expired, subject to the payment of the rent to the owner.—Renusson, *Douaire*, c. 14; Pocquet, 227; Coquille, quest., 156; Pothier, *Douaire*, 229, 279; Lamoignon, *Douaire*, art. 45; C. C., 457. [II. 459.]

1458. The dowager, like any other usufructuary, is liable for all the ordinary or extraordinary charges which affect the immoveable subject to dower, or which may be imposed upon it during the term of her enjoyment, as set forth in the title *Of Usufruct, of Use and Habitation*.—Renusson, *Douaire*, c. 8, n. 8; Loysel, *Douaire*, règle 18, 2 Prevot de la Jannès, 136; Pocquet, règle 26, p. 227; Lacombe, vo. *Douaire*, 244; Pothier, *Douaire*, 230 et seq.; Lamoignon, *Douaire*, art. 42. [II. 459.]

Digitized by Google

DECISION:—Les charges annuelles municipales et autres sont des charges de la jouissance et possession de l'immeuble, et le détenteur ne peut demander le remboursement des arrérages qu'il en a payés et qui se sont accrus pendant sa jouissance.—BERTHELOT, J.—*Filion vs De Beaujeu*, 5 L. C. J., p. 128.

1459. She is liable only for the lesser repairs; for the greater repairs, the owner remains liable, unless they have been necessitated by the fault or negligence of the dowager.—Paris, 262; Pocquet, règle 23, p. 228; Loysel, *Douaire*, règle 18; 2 Prevot de la Jannès, 136, 138; Lacombe, vo. *Douaire*, n. 45; Pothier, *Douaire*, 237; Lamoignon, *Douaire*, art. 45; C. C., 468, 469. [II. 459.]

1460. The dowager, like every other usufructuary, takes the things which are subject to the dower in the condition in which they are at the time of the opening.

The same rule applies to the dowable children, as regards the property itself, in cases where the usufruct of the wife does not take place.

If they do not take the property until after the expiration of the usufruct, or if at that time there be no dowable children, the succession of the wife is answerable, in the first case to such children, and in the second case to the heirs of the husband, according to the rules which relate to the enjoyment and the obligations of the usufructuary under particular title.—*ff* L. 65, *De usufructu;* L. 12, *De usu et usufructu;* 2 Prevot de la Jannès, 138; 2 Argou, 202; Lacombe, *Douaire*, sec. 5, pp. 239, 244; Guyot, Rép., vo. *Usufruit*, p. 393; Merlin, *Usufruit*, § 2, n. 2; C. C., 455, 476. [II. 459.]

1461. If nevertheless, during the marriage, considerable additions have been made to the thing, the wife cannot enjoy them without paying the excess of value, if her dower consist in ownership, or the interest of such excess, if it be in usufruct.

She may however demand the removal of such additions if it can be effected with advantage and without deteriorating the thing.

If they cannot be removed, the wife may, for the purpose of paying the excess of the value, obtain a licitation.

Dowable children who take the property without their mother having had the usufruct of it, fall under the same rules with regard to such additions.

If during the marriage, the thing subject to dower have suffered deterioration, to the benefit of the husband or of the community, the

Digitized by Google

wife and the children who claim dower are entitled to compensation. —Lebrun, *Suc.*, p. 383 ; Renusson, *Douaire*, 30-1 ; 3 Gr. Cout., 906 ; Duplessis, *Douaire*, 249 ; Lemaistre, *Douaire*, 307 ; Pothier, *Douaire*, 238-9 ; 7 Nouv. Den., 199 ; Lamoignon, *Douaire*, art. 11, 12, 13 ; C. C., 417, 582. [II. 459 to 461.]

1462. The dower of the wife is terminated like any other usufruct by the causes enumerated in article 479.—2 Prevot de la Jannès, 140 ; Pothier, *Douaire*, 247, 248, 249, 253, 254, 255. [II. 461.]

1463. The wife may be deprived of her dower by reason of adultery or of desertion.

In either case, an action must have been instituted by the husband, and a subsequent reconciliation must not have taken place ; the heirs, in such case, can only continue the action commenced, if it have not been abandoned.—2 Prevot de la Jannès, 141 ; Pocquet, règles 29, 30, 31 ; Loysel, *Douaire*, règle 39 ; Coquille, quest. 147 ; Pothier, *Douaire*, 256 et seq. ; Lamoignon, *Douaire*, art. 47, 48, 49 ; C. C., 187, 211 ; 1 Revue de Lég., 450. [II. 461.]

DECISIONS :—1. A widow guilty of unchastity during the first year of her widowhood is liable to be deprived of her dower, but the judgment to that effect as to rents, issues and profits will be prospective only.—C. R.—*J. vs R.*, 7 L. C. R., p. 391.

2. L'adultère de la femme, durant le mariage, ne peut être l'objet d'une fin de non-recevoir de la part de l'héritier, pour lui faire perdre ses droits de communauté ;—cette fin de non-recevoir ne peut être plaidée que par le mari ;—si le mari ne s'est pas pourvu contre elle durant son vivant pour la faire déclarer déchue de ses droits matrimoniaux, l'héritier est non recevable à le faire.—L'absence de la femme du domicile conjugal et son défaut de collaboration durant le mariage, pour *cause légitime*, ne la privent pas de ses droits matrimoniaux après le décès de son mari ;—entr'autres causes légitimes de cette nature, le fait que le mari a vécu en concubinage dans sa propre maison, est suffisant pour autoriser sa femme à vivre séparée de lui ; dans un tel cas l'abandon du mari à son lit de mort, par sa femme, est justifiable.—BADGLEY, J.—*Gadbois vs Bonnier*, 5 L. C. J., p. 257.

1464. The wife may also be declared to have forfeited her dower by reason of the abuse she has made of her enjoyment, under the circumstances and modifications set forth in article 480.—Renusson, *Douaire*, c. 12, nn. 21, 22 ; Pocquet, règle 28, p. 228 ; Pothier, *Douaire*, 262, 263 ; C. C., 480. [II. 461.]

1465. If the wife be declared to have forfeited her usufruct

Digitized by Google

for any of the causes above mentioned, or if, after the opening of the dower, she renounce it simply and absolutely, the dowable children take the property from the time of the renunciation, or of the forfeiture, if it take place after the opening.—Lamoignon, *Douaire*, art. 65. [II. 461.]

SECTION III.—PARTICULAR PROVISIONS AS TO THE DOWER OF CHILDREN.

1466. The children entitled to dower are those who are born of the marriage for which it was constituted.

Children of the consorts who were born before the marriage, but are legitimated by it, are deemed to be children of the marriage; so are those who were conceived at the time of their father's death and are born afterwards; and so are also the grandchildren whose father being a child of the marriage, died before the opening of the dower.

Those children only can claim dower who were capable of succeeding to their father at the time of his death.—Pothier, *Douaire*, 344 et seq., 392; Lamoignon, *Douaire*, art. 56, 63; 12 Pand. Franç., 374. [II. 461.]

1467. A child who assumes the quality of heir to his father, even under benefit of inventory, can have no share in the dower.—Paris, 250, 251, 254; 2 Laurière, 266 et seq.; Pothier, *Douaire*, 350; *Contrà*, 2 Argou, 143; 2 Prevot de la Jannès, 143; Pothier, *Douaire*, 351. [II. 461.]

DECISIONS:—1. Trois des demandeurs ayant fait acte d'héritiers de leur père, leur renonciation subséquente sera annulée et ils ne pourront réclamer leur part du douaire coutumier créé par leur père.—BERTHELOT, J.—*Filion vs De-Beaujeu*, 5 L. C. J., p. 128.

2. Que les enfants ne peuvent réclamer le douaire créé par le mariage de leur père, qu'en renonçant à sa succession.—Q. B.—*Betournay & Moquin*, 2 Q. B. R., p. 187.

1468. In order to be entitled to dower, the child is bound to return into the succession of his father all such benefits as he has received from him, in marriage or otherwise, or to take less in the dower.—Paris, 252; 2 Laurière, 269; 2 Prevot de la Jannès, 144; 2 Argou, 145, 146; Pothier, *Douaire*, 352 et seq,; Lamoignon, *Douaire*, art. 62. [II. 461.]

1469. The dowered children are not bound to pay the debts which have been contracted by their father since the marriage; as

Digitized by Google

to those which were contracted previously, they are only liable hypothecarily for them, with a recourse against the other property of their father.—Paris, 250 ; 2 Laurière, 262 ; 2 Argou, 255 ; Lamoignon, *Douaire*, art. 62. [II. 463.]

1470. When conventional dower consists in a sum of money to be paid once for all, it is to all intents deemed moveable.—Paris, 259 ; 2 Laurière, 284. [II. 463.]

1471. After the opening of the dower and the termination of the usufruct of the wife, the property composing such dower is divided amongst the children and grandchildren entitled to it, in the same manner as if it had fallen to them by succession.

The shares of those who renounce remain in the succession, and do not increase the shares of the other children who take dower.—Paris, 250 ; 2 Prevot de la Jannès, 143 ; 2 Argou, 141, 143, 144 ; Pothier, *Douaire*, 393, 394, 395 ; Lamoignon, art. 61 ; 12 Pand. Franç., 176. [II. 463.]

DECISION :—Les parts des douairiers qui renoncent au douaire restent dans la succession de leur père et n'augmentent pas celles des autres enfants qui s'en tiennent au douaire.—LORANGER, J.—*Lepage vs Chartier*, 11 L. C. J., p. 29.

TITLE FIFTH.

OF SALE.

CHAPTER FIRST.

GENERAL PROVISIONS.

1472. [Sale is a contract by which one party gives a thing to the other for a price in money which the latter obliges himself to pay for it.

It is perfected by the consent alone of the parties, although the thing sold be not then delivered ; subject nevertheless to the provisions contained in article 1027 and to the special rules concerning the transfer of registered vessels.]—Domat, liv. 1, tit. 2, sec. 1, nn. 1, 2 ;

Digitized by Google

Troplong, *Vente*, nn. 4, 37 et seq.; 6 Marcadé, pp. 142 et seq; C. C., art. 1022, 1025, 1027; C. N., 1582, 1583. [II. 39, III. 383.]

DECISIONS:—1. To enable a purchaser to institute a petitory action, it is not necessary that he should have had the possession or actual tradition of the immoveable property claimed, provided that the vendor was in possession of such immoveable at the time of the sale.—Q. B.—*Bilodeau & Lefrançois*, 12 L C. R. p. 25.

2. Les défendeurs ayant acheté de la fleur, livrable aux magasins des demandeurs, de temps à autre, à la demande des acheteurs, la vente est parfaite quoiqu'il n'y ait pas tradition au moment du contrat, et la fleur demeurée aux dits magasins est la propriété des acheteurs et à leurs risques et périls.—Smith, J.—*Boyer vs Prieur*, 7 L. C. J., p. 52.

3. A transfer of goods may be validly made to a banking institution by the delivery of a warehouse receipt without endorsement.—C. R.—*Molsons Bank vs Janes*, 9 L. C. J., p. 81.

4. In a sale of timber growing, with the right to cut the same, the only tradition that the vendor can make at the time is to point out to the purchaser the trees to be cut.—Badgley, J.—*Russell vs Guertin*, 10 L. C. J., p. 133.

5. The acceptance by a third party or middle-man of a delivery order granted by a vendor in favor of a vendee, for goods to be manufactured by the third party or middle-man, and the setting apart these goods as subject to the vendee's orders by the third party or middle-man, as they are manufactured, is a complete delivery, even though they should still be entered in the vendor's name in the books of the third party or middle-man.—Q. B.—*Broster & Hall*, 10 L. C. J., p. 205.

6. La vente est parfaite par le seul consentement des parties, lorsqu'elle est d'un corps certain et déterminé et pour un prix fixe et déterminé. Dans ce cas, l'acheteur a droit de saisir-revendiquer l'objet vendu.—C. R.—*Kelly vs Merville*, 1 R. L., 194.

7. Avant la promulgation du Code Civil, art. 1472, le vendeur n'était pas tenu de transférer la propriété.—Beaudry, J.—*Armstrong vs Dufresnay*, 3 R. L. p. 366.

8. Qu'une vente ou promesse de vente peut être valable sans que le prix en soit fixé.—Q. B.—*Nault & Price*, 4 Q. B. R., p. 348, 11 Q. L. R., p. 309.

(Confirmed in the Privy Council, 13 Q. L. R., p. 287, 12 App. Cas., p. 110.)

9. Ramsay, J. *loq.*—Article 1472 C. C. is to be understood *sub modo*. One distinction is that where the vendor remains in possession, fraud will be presumed.—Q. B.—*Black & Walker*, M. L. R., 1 Q. B., p. 225.

10. Cross, J. *loq.*—The consent of the parties completes the sale and gives a good title to the vendee, but it is equally clear that a vendor who has given a good title by consent, may afterwards give a better title to another by consent and delivery.—Q. B.—*Fairbanks & Barlow*, M. L. R., 2 Q. B., p. 332.

(Confirmed in the Supreme Court, 10 L. N., p. 108, 14 S. C. R., p. 218. The holding of the Supreme Court is noted in full at C. C. 2194.)

11. In this case, the sale was simulated and was in reality a pledging of moveables claimed to have been sold, rather than a veritable sale of them, and the transaction had not the *indicia* of a *bona fide* sale.—Privy Council.—*Cushing & Dupuis*, 5 App. Cas., 409, 24 L. C. J., p. 151, 3 L. N., p. 171, R. A. C., p. 913.

Digitized by Google

12. Qu'un bail de meubles pour une certaine somme représentant leur valeur, avec la condition que lorsque la somme stipulée sera payée, les immeubles seront la propriété du locataire, est parfaitement régulier et constitue bien un louage et non pas une vente.—MOUSSEAU, J.—*May vs Fournier*, M. R. L., 1 S. C., p. 389.

13. Similar decision noted at C. C. 1478.—MATHIEU, J.—*Bertrand vs Gaudreau*, 12 R. L., p. 154.

14. Que la vente d'un navire, faite par acte sous seing privé non enrégistré rend l'acheteur propriétaire, même à l'égard des tiers.—Q. B.—*Michon & Marcotte*, 9 Q. L. R., p. 330.

15. That where a Bill of Exchange for the price of goods is enclosed to the buyer for acceptance, together with the Bill of Lading, which has been made to the order of the seller's agent and which is the symbol of the property of the goods, the buyer cannot lawfully retain the Bill of Lading without accepting the Bill of Exchange, and if he do so retain it, he thereby acquires no right to the Bill of Lading or to the goods.—C. R.—*McGillivray vs Watt*, 31 L. C. J., p. 49, M. R. L., 3 S. C., p. 170.—Q. B.—31 L. C. J., p. 278, M. L. R., 3 Q. B., p. 249.

16. That in a contract for the sale of moveables a stipulation that no title shall pass until perfect payment of the price is lawful and in default of payment such moveables may be revendicated in the possession of a third party who has purchased in good faith, unless protected by the exceptions provided for by articles 1488, 1489 and 1490 C. C. or by a prescriptive title under C. C. 2268.—ANDREWS, J.—*Gray vs L'Hôpital du Sacré Cœur*, 13 Q. L. R., p. 85.

17. That a sale made on condition that the property in the article sold shall remain in the vendor until payment, is valid as a conditional sale and that the seller can recover back the goods in default of payment although they are under seizure at the suit of a third party.—BÉLANGER, J.—*Harrigan vs Harrigan*, 11 L. N., p. 201.

18. That where an undertaking to purchase a property is made in writing by one of the parties, the acceptance of the same by the other party need not be in writing, but may be inferred from the acts of such party.—TAIT, J.—*Greene vs Mappen*, 31 L. C. J., p. 163, M. L. R., 3 S. C., p. 393.

See also cases noted at C. C. 1476.

1473. The contract of sale is subject to the general rules relating to contracts and to the effects and extinction of obligations declared in the title *Of Obligations*, unless it is otherwise specially provided in this code.—C. N. 1584 ; [II. 39.]

DECISIONS:—1. Where an absolute deed of sale is made and, simultaneously with it, another deed is past whereby the purchaser agrees to re-assign the articles transferred to him by the deed of sale back to the vendor upon the performance of a certain condition, and this condition is not complied with, the deed of sale remains in full force and the purchaser is absolute owner and proprietor of the effects transferred to him in virtue thereof.—PRIVY COUNCIL.—*Shaw & Jeffery*, 10 L. C. R., p. 340, 13 Moore's P. C. Rep., p. 432.

2. A lease of moveable property containing at the same time a promise of sale, dependant on the payment of certain instalments is a conditional sale, and therefore on non-payment of the balance of the same, the vendor cannot proceed

Digitized by Google

by *saisie-revendication* against the purchaser. The action should be for resiliation of the sale.—CARON, BADGLEY, MONK and DRUMMOND, J. J. (Duval, C. J. dissenting.) Messrs. J. J. Caron, Badgley and Drummond would not, however, dismiss plaintiff's demand for a condemnation against the purchaser to pay the instalments due. Action maintened *pro tanto*, but *saisie-revendication* set aside. Mr. Justice Monk, with the Court of Review, thought that in a *saisie-revendication*, no such condemnation could be made.—Q. B.—*Brown & Lemieux*, 1 R. C., 476.

3. L'absence de sceau sur un acte de vente d'une propriété acquise par la demanderesse en cette cause, lorsqu'elle a été mise en possession et a payé le prix de vente, n'est pas une cause de nullité de la vente.—MACKAY, J.—*St Patrick's Hall Association vs Moore*, 5 R. L., p. 294.

1474. When things moveable are sold by weight, number or measure, and not in the lump, the sale is not perfect until they have been weighed, counted or measured; but the buyer may demand the delivery of them or damages according to circumstances.—*ff* L. 8, *De periculo et comm. rei venditæ ;* L. 35, § 5 ; *De contr. empt.* ; Pothier, *Vente*, n. 308; 6 Marcadé, p. 149; Troplong, *Vente*, nn. 86, 87; 14 Fenet, pp. 4, 21, 85, 153, 182, 183; C, N., 1585. [II. 39.]

DECISIONS:—1. Upon the sale of goods by admensuration, which may happen to be destroyed before measurement, the loss is cast upon the seller. Stipulations of admeasurement and delivery at a particular place and time renders the sale conditional and incomplete until the occurrence of those events, and in the meantime the risk, *periculum rei venditæ*, must be borne by the seller.—COURT OF APPEALS :—*Le Mesurier & Logan*, 1 R. de L., p. 176.

2. In the case of non-execution of a contract of sale of a specific and determined article destroyed by *vis major* without any fault of the vendor and which cannot be replaced, an action can be maintained for the restitution of the moneys paid in advance of such contract, but cannot be maintained for damages by reason of the non-execution of the same.—Judgment of the Superior Court accordingly confirmed as to the restitution and reversed as to the damages which were awarded.—Q. B.—*Russel & Levey*, 2 L. C. R., p. 457.—BOWEN & MEREDITH, JJ.—2 L. C. R., p. 257.

3. Where three chains are attached together for the purpose of delivery, they compose one whole, and delivery of any one of them, will not be held to have been made until all three shall have been delivered.—Q. B.—*McMaster & Walker*, 8 L. C. R., p. 171.

4. Held in the Superior Court :—That a purchaser who has received part of a quantity of flour sold by sample is entitled, when sued for the price, to a reduction equal to the diminished value of the flour received, it being, inferior to the sample. That the purchaser is bound on receipt of the flour to have it examined without delay and to tender it back, and that a notarial protest and tender on the 21st. July was too late, the sale and delivery having been made on the 19th. June, although verbal notice of the bad quality of the flour had been given to the brokers on the 27th. June. That the purchaser having sold part of the flour, was, not entitled to have the sale set aside for the remainder of the flour received.—Held in Appeal :—That an offer to deliver back a portion of the flour remaining

Digitized by Google

in the hands of the purchaser was a valid offer and that the confession of judgment offered in one of the pleas for the balance of price was sufficient and should have been accepted. The purchaser was entitled as part of his damages, to deduct the cost of transportation to and from his customers in the country, to whom part of the flour had been forwarded without having been examined, and also the deduction from the price allowed to the customers on such sales.—Q. B. —*Leduc & Shaw*, 13 L. C. R., p. 438.

5. In the case of a sale of a given quantity of seed by sample, where the bulk proves inferior to sample, the purchaser is not bound to accept the part which is equal to sample, but may repudiate the whole purchase.—C. R.—*Desmarteau vs Harvey*, 17 L. C. J., p. 244.

6. La vente d'objets dont le prix doit être payé à tant la mesure, ne peut être parfaite que par la livraison. Dans ce cas, l'acheteur n'a pas d'autre action que celle pour demander la livraison des effets vendus, et des dommages, le cas échéant. Dans le dernier cas, si l'acheteur institue une action en revendication comme propriétaire, son action sera déboutée sur *demurrer ;* cependant il pourrait avoir droit à une saisie conservatoire des objets vendus.—C. R.—*Kelly vs Merville*, 1 R. L., p. 194.

7. Une partie qui se fait mesurer et couper des marchandises et qui offre ensuite un accompte, a droit, sur le refus du marchand de livrer toutes les marchandises, de choisir parmi les effets achetés pour la valeur de cet accompte ou de se faire rembourser le montant payé. Le marchand ne peut retenir le montant payé, sous prétexte de l'insolvabilité de l'acheteur, et sur le motif qu'il représente la valeur des marchandises coupées, malgré qu'il offre de les remettre.—JOHNSON, J.—*Walsh vs Bernard*, 4 R. L., p. 659.

8. By a writing *sous seing privé*, L. purchased from D. 2,265 cords of wood "as now corded at Port Lewis," for the sum of $4,520, and by the same writing acknowledged receipt of the wood, declared himself satisfied therewith, and discharged the vendor "*de toute garantie ultérieure.*" The purchaser having measured the wood, found it 423 cords short, and a portion of it rotten. Suit was thereupon instituted for the value of wood not delivered and of the part that was rotten. *Held*, that, by the terms of the agreement, the sale was *en bloc* and not by the cord, and the purchaser could not recover.—Q. B.—*Lalonde & Drolet*, 1 L. N., p. 29.

9. In the case of a sale of rags by sample, the purchaser may claim the resiliation of the sale, on the ground that the rags delivered were not according to sample, within a reasonable delay after delivery. The mere reception of the rags at the railway depot where they were delivered, without special examination and comparison with the samples, and the payment of a sum on account, on the supposition that all was right, will not operate as a bar to the vendee's repudiating the sale after discovery that the rags were not according to sample.—Q. B.—*Buntin & Hibbard*, 10 L. C. J., p. 1.

10. When the article sold turns out to be something entirely different, the sale is null, though made by sample.—BADGLEY, J.—*Kerry vs Sewell*, 1 L. C. L. J., p. 62.

11. The Defendant agreed to purchase a quantity of cheese in warehouse, with right to reject spoiled cheese. The cheese being sold by the pound, it had to be weighed. He sent men to examine the cheese and they set apart 1643, boxes as acceptable and rejected 33. At his request, the cheese was allowed to remain a few days longer than the date agreed on for its removal, and was then

Digitized by Google

damaged by a flood. The Defendant refused to carry out the purchase and the cheese was re-sold at a loss.—*Held* :—That the sale was complete on the examination of the boxes and that it was then at the risk of the buyer, who must bear the loss.—TORRANCE, J.—*Ross vs Hannan*, M. L. R., 2 S. C., p. 395.

12. Que l'acquéreur d'un objet indéterminé, dans l'espèce, 78 cordes de bois, ne peut prendre une saisie revendication pour revendiquer cet objet, avant qu'il soit déterminé.—MATHIEU, J.—*Contant vs Normandin*, 11 R. L., p. 479.

13. Que dans une vente de choses mobilières, au poids, au compte ou à la mesure, et non en bloc, l'acheteur est tenu de payer le prix de vente, suivant la convention, quoique la vente ne soit pas parfaite.—MATHIEU, J.—*Riopelle vs Fleury*, 12 R. L., p. 303.

14. Appellants had no right to refuse payment for the cargo on the grounds of deficiency in the delivery, considering that the weighing was done by the defendants in the absence of the plaintiffs and without notice to them, at a time when the defendants were bound by the option they had previously made to take the coal in bulk.—SUPREME COURT.—*Hudon Cotton Co. & Canada Shipping Co*, 13 S. C. R., p. 403.

See also cases noted at C. C., 1492 and 1493.

1475. The sale of a thing upon trial is presumed to be made under a suspensive condition, when the intention of the parties to the contrary is not apparent.—*ff* L. 3, L. 34, § 5, *De contr. empt.*; L. 31, § 32; *De ædilitio edicto ;* Domat, liv. 1, tit. 2, *Du contrat de vente*, sec. 4, n. 8 ; Pothier, *Vente*, nn. 264-5-6 ; Marcadé, vol. 6, p. 156 ; Troplong, *Vente*, nn. 106, 107 ; C. N., 1588. [II. 39.]

DECISIONS :—1. The plaintiff sued for the price of a mowing and reaping machine. The plea was that the machine was only taken on trial, to be kept only in case it should prove a perfect instrument in every respect and that on trial the machine was found unsuitable, and that defendant had notified the plaintiff accordingly and called upon him to take away the machine. The inferior Court gave judgment in favor of the plaintiff, but the majority of the Court of Appeals was in favor of reversing that judgment.—Q. B.—*Fallow & Smith*, 1 L. C. L. J., p. 35.

2. Qu'un défendeur poursuivi pour $158.40, prix d'une machine à lui vendue, et qui plaide qu'il n'a reçue cette machine qu'à l'essai, et que n'en ayant pas été satisfait, il a informé le vendeur d'avoir à la reprendre, tel que convenu, peut prouver son plaidoyer par témoins. (C. C. 1233.)—TASCHEREAU, J.—*Chapin vs Whitfield*, M. L. R., 2 S. C., p. 187.

1476. A simple promise of sale is not equivalent to a sale, but the creditor may demand that the debtor shall execute a deed of sale in his favor according to the terms of the promise, and in default of so doing, that the judgment shall be equivalent to such deed and have all its legal effects ; or he may recover damages according to the rules contained in the title *Of Obligations*.—Pothier, *Vente*, 479 ; Bardet,

Digitized by Google

Arrêt 2 mars 1627 ; Journ. des Aud., Arrêt 28 mai 1658; C. N., 1589. [II. 39.]

DECISIONS:—1. A naked promise to sell without a price being named, and without any promise on the part of the vendee to buy, to pay for or to accept the land, is a *nudum pactum*.—K. B.—*Bélair vs Pélisson*, 2 R. de L., p. 79.

2. The defendants agreed to sell their undivided share in a certain land and premises to one Laberge and his wife and to the plaintiffs jointly.—*Held:* that a joint and separate action would not lie to compel the execution of the agreement, but where action was brought by one of the parties alone it was held that, as the non-execution of the agreement was occasioned, not by the refusal of the defendant, but by the refusal of the wife of Laberge to join in the deed of sale, the action of the plaintiffs could not be maintained.—COURT OF APPEALS.—*Gaudin & Pichette*, 3 R. de L., p. 261.

3. In an action to compel a party to execute a deed of sale, the plaintiff is not bound to tender by his action and to deposit in court the purchase money, more particularly if the defendant plead that he is unable to execute the required deed.—C. R.—*Perrault vs Arcand*, 4 L. C. R., p. 449.

4. In an action to resiliate a verbal promise of sale of an immoveable, admitted by the defendant, but with conditions different from those alleged by the plaintiff, the latter, who has adduced no evidence, has the right to a judgment conformably with the conditions admitted by the defendant.—Q. B.—*Lacroix & Lambert*, 12 L. C. R., p. 229.

5. To entitle a party to an action of damages for the non-fulfilment of a promise of sale, the promise must either have been given in writing or must be clearly admitted by the defendant.—TASCHEREAU, J.—*Gagnon vs Fecteau*, 15 L. C. R., p. 89.

6. Que la promesse de vente (qui vaut vente) quoique verbale, est obligatoire.—Q. B.—*Pinsonnault & Dubé*, 3 L. C. J., p. 176.

7. The Defendant verbally agreed to sell his house and lot to the Plaintiff for $1000, payable on the Plaintiff taking possession on the 1st May. The Defendant, on being sued to execute a title deed in conformity with his promise, pleaded that there was no bargain made but that there were certain allusions to the subject (*pourparlers*) which he recounts, but positively denied agreement to sell. The Defendant, on oath as a witness, admitted that he had promised to sell the house as claimed by the plaintiff. On cross-examination by his own counsel, the Defendant further said that it was a further condition to the sale that his (the Defendant's) wife's assent should be given. This not having been pleaded was held by the court to be a mere afterthought and judgment was consequently rendered in favor of the Plaintiff.—JOHNSON, J.—*Leclère vs Gagnon*, 5 R. L., p. 447.

8. A promise to sell certain real estate was made subject to three conditions which were to be complied with at certain specified times. These conditions not having been fulfilled an action was brought to annul the promise of sale, and judgment was rendered accordingly.—Q. B.—*Charlebois & Lemaire*, 8 R. L., p. 306.

See also cases noted at C. C. 1472.

1477. If a promise of sale be accompanied by the giving of earnest, each of the contracting parties may recede from it ; he who

Digitized by Google

has given the earnest, by forfeiting it, and he who received it, by returning double the amount.—Pothier, *Vente*, 500 et seq ; C. L., 2438 ; C. Cant. Vaud, 1122 ; C. N., 1590. [II. 39.]

1478. A promise of sale with tradition and actual possession is equivalent to sale.—C. N., 1589. [II. 41.]

DECISIONS :—1. A verbal sale of an immoveable accompanied by a promise to pass the requisite deeds therefor at later date, is not a complete and perfected contract of sale. The sale of immoveables, so long as it is not followed by the execution of a deed of sale, is nothing more than a *pourparler*, or negociation for a sale, and either of the parties thereto can desist therefrom.—The effect of a promise of sale and the effect of a verbal sale of immoveables discussed.—COURT OF APPEALS.—*Gaudin & Pichette*, 3 R. de L., p. 261.

2. A deed purporting to be a promise of sale but containing *saisine* in favour of the purchaser and transfer of possession by the vendor is in effect a deed of sale, notwithstanding a condition to give a title after payment of the first instalment.—Q. B.—*Kerr & Livingstone*, 1 L. C. R., p. 275.

3. A promise of sale accompanied by delivery is equivalent to a sale and an actions for *lods et ventes* will lie.—STUART, J.—*Seminary of Quebec vs Maguire*, 9 L. C. R., p. 272.

4. A promise of sale, followed by possession, is equivalent to an absolute sale and an hypothecary claim created against the vendor subsequent to such promise of sale is inoperative as against the property sold.—Where such purchaser brings an action against a third party to whom he has resold a portion of the property, as well in his quality of proprietor as in his capacity of attorney of his vendor under such promise of sale, judgment must be rendered in his favor as proprietor and his selling in the capacity of attorney of his vendor cannot affect his right to recover as proprietor.—Q. B.—*Gosselin & Grand Trunk Ry.*, 9 L. C. R., p. 315.

5. La promesse de vente (qui vaut vente), quoique verbale, est obligatoire. Q. B.—*Pinsonneault & Dubé*, 3 L. C. J., p. 176.

6. Par ces mots : " Promesse de vente avec tradition et possession actuelle " équivaut à vente," il faut entendre qu'une telle promesse, tout en liant celui qui promet assez énergiquement pour que la vente s'ensuive forcément si l'autre partie remplit les conditions du contrat, ne signifie pas néanmoins que telle promesse de vente est, en droit, la même chose qu'une vente ; telle promesse n'a pas l'effet de transporter le droit de propriété en la personne du stipulant, lorsqu'il appert par les termes du contrat que telle n'a pas été l'intention des parties, mais qu'au contraire elles ont voulu réserver cet effet à un acte postérieur et conserver le droit de propriété en la personne du promettant. Le droit de demander la résolution de la vente, faute de paiement du prix, appartient au vendeur, malgré qu'il ait stipulé comme remède à l'inexécution des conditions de la part de celui qui a promis d'acheter, la revente ou reprise des biens vendus, surtout s'il a stipulé ce remède sans préjudice à tout autre droit. La clause par laquelle le vendeur se réserve le droit de " se faire remettre, reprendre et revendiquer," n'est rien autre que le pacte commissoire. La position du promettetur n'est sous ce rapport nullement changée par la faillite de celui à qui il a promis de vendre.—MACKAY, J.—*Renaud vs Arcand*, 14 L. C. J., p. 102.

Digitized by Google

7. Where the plaintiff by an agreement in writing transferred to the defendant a barge to use it and take possession of it at once, but subject to the express condition that such use and possession would give the defendant no right of property in the barge until he should have completed delivery of 500 tons of coal to plaintiff, according as the latter would require it, and the barge was lost by *force majeure*, without fault of the defendant, before the coal was all delivered though after the time mentioned in the agreement within which it was deliverable: these circumstances did not take the case out of the ordinary rule *res perit domino;* the loss of the barge fell on the plaintiff as owner, and the defendant was not bound to complete delivery of the coal.—C. R.—*Beaudry vs Janes*, 15 L. C. J. p. 118.

8. In the case of an agreement (before our Civil Code) by A. B. to purchase from C. D. a lot of land for a specified sum, to be paid by instalments, followed by a bond from C. D. in a penal sum, to the effect that, on the purchase money being fully paid, C. D. would execute a deed of sale in due form, and followed also by actual and uninterrupted possession, by A. B., the right of property of C. D. in the lot of land was unaffected, so long as any portion of the purchase money remained unpaid and, therefore, C. D. had a right to be collocated for such unpaid purchase money, in the distribution of the proceeds of a sale of the lot by the sheriff, in preference to duly registered judgments obtained by creditors of A. B. against him, while in possession of the lot,—and this, without any registration either of the agreement or of the bond.—Q. B.—*Thomas & Aylen*, 16 L. C. J., p. 309.

9. L'appelant ayant obtenu une promesse de vente de l'agent publiquement reconnu d'une compagnie faisant le commerce de propriétés immobilières, et ayant pris possession du terrain, ne peut être dépossédé par cette compagnie, sans aucune raison valable.—Q. B.—*Dubrule & Lafontaine*, 1 R. L., p. 709.

10. A condition in a promise of sale, that although followed by possession, it should not be equivalent to a sale, held valid.—C. R.—*Noel vs Laverdière*, 4 Q. L. R., p. 247.

11. Qu'une promesse de vente d'un immeuble, accompagnée de possession, équivaut à une vente et que, lorsqu'elle est faite par un agent ordinaire, sans autorisation spéciale, elle est valable sans que le prix en soit fixé.—Q. B.—*Nault & Price*, 4 Q. B. R., p. 348, 11 Q. L. R., p. 309.—Privy Council—13 Q. L. R., p. 287, 12 App. Cas., p. 110.

12. Que la convention par laquelle le propriétaire d'un cheval le loue pour le temps de 7½ mois, moyennant un loyer de $90, et au cas du paiement total du loyer promet le vendre alors et donner quittance du prix que le loyer représente, est légale, et que la propriété du cheval ne change pas tant que le loyer n'est pas intégralement payé. Que le propriétaire peut revendiquer ce cheval, même entre les mains d'un tiers.—Mathieu, J.—*Bertrand vs Gaudreau*, 12 R. L., p. 154.

13. Similar decision noted at C. C. 1472, n. 12.—Mousseau, J.—*May vs Fournier*, M. L. R., 1 S. C., p. 389.

14. Where a piano was sold conditionally upon the price being paid by the purchaser, it was held that the proprietorship was in the vendor so long as the price was not paid to him.—C. R.—*Fairview vs Wheeler*, 4 L. N., p. 237.

15. When in an agreement of sale of land, accompanied by possession of the vendor, it was stipulated that the vendor should furnish deed if the payments agreed on were punctually made, the purchaser forfeited his rights by failure to

Digitized by Google

make the payments as stipulated, without being put *en demeure*. (See cases at C. C. 1067.)—SUPREME COURT.—*Grange & McLennan*, 9 S. C. R., p. 385, C. D., p. 462, 6 L. N., p. 209, 28 L. C. J., p. 69.

16. Qu'une personne qui vend un meuble et retient son droit de propriété jusqu'au parfait paiement des billets promissoires représentant le prix de vente, ne peut saisir revendiquer ce meuble entre les mains d'un tiers de bonne foi, lorsqu'il a été vendu à ce dernier par l'acheteur avant l'échéance des billets. Il en serait autrement, et le propriétaire pourrait saisir revendiquer son meuble si ce dernier eût été perdu ou volé, par exemple, si le propriétaire l'eût loué, avec stipulation que le locataire deviendrait propriétaire en remplissant les conditions du bail, et que le locataire l'eût vendu.—JOHNSON, J.—*Goldie vs Bisaillon*, 7 L. N., p. 347.

See also cases noted at C. C. 1487.

1479. The expense of the title deed and other accessories to a sale is borne by the buyer, unless it is otherwise stipulated.—C. L., 2441 ; C. C. Vaud, 1123 ; C. N., 1593. [II. 41.]

DECISION :—Que les frais d'enregistrement d'un contrat de vente sont compris dans ceux que l'acheteur est tenu de payer.—C. R.—*Prud'homme vs Scott*, 30 L. C. J., p. 156, M. L. R., 2 S. C., p. 63.

1480. The articles of this title, in so far as they affect the rights of third persons, are subject to the special modifications and restrictions contained in the title *Of Registration of Real Rights.*— II. 41.]

1481. Tavern-keepers, or others, selling to persons other than travellers, intoxicating liquors to be drunk on the spot, have no action for the recovery of the price of such liquors.—Cout. de Paris, art. 128 ; Guyot, Rép., vo. *Cabaretier*, p. 575 ; Cout. d'Orl., art. 267 ; N. Denisart, vo. *Cabaret*, n. 16, vo. *Aubergiste*, n 4. [II. 41.]

Amendment :—The Quebec License Act of 1878 enacts as follows :

105. Every payment in money, or in objects having a pecuniary value, for intoxicating liquors, furnished in contravention of this law, is held to have been made without consideration and against law.

106. The amount thereof may be recovered from the receiver thereof by the party who made such payment, or by his wife without the authorization of her husband, and by his father or his tutor if he be a minor ; and all contracts and obligations whatever, in whole or in part, made and entered into, for or by reason of such furnishing of such liquors, in violation of law, are null ; saving the rights of third parties.

Digitized by Google

107. No action can be maintained, for or by reason of the sale of liquors, furnished in contravention of this law. This article does not affect the provisions of article 1481 of the civil code of Lower Canada. —Q. 41 Vict., cap. 3, ss. 105-107.

DECISIONS:—1. La valeur des boissons vendues aux voyageurs qui séjournent dans un hôtel est recouvrable en justice.—BERTHELOT, J.—*Mercier vs Brillon*, 5 L. C. J., p. 337.

2. The supply of refreshments to a gang of men collected during an election of a representative to the Commons of Canada, to be used in case of an emergency, gives rise to no action at law for payment of the refreshments.—TORRANCE, J.—*Johnson vs Drummond*, 17 L. C. J., p. 176.

3. Il n'y a pas d'action pour le prix des liqueurs enivrantes, vendues par des cabaretiers pour être bues sur le lieu, à d'autre qu'à des voyageurs, même lorsque le débiteur a reconnu la dette dont la nature n'est pas changée par la reconnaissance.—LORANGER, J.—*Bergeron vs Fleury*, 7 R. L., 183.

4. Que le prix de la boisson, même vendue au verre par un restaurateur, pour consommer pendant le repas, peut être recouvré en loi.—BERTHELOT, J.—*Philippe vs Desmarais*, 28 L. C. J., p. 291.

5. A person who furnishes a room in an hotel and lives there during two months, cannot be considered "a traveller" and therefore the inn-keeper has no action to recover the price of intoxicating liquors sold to him.—C. R.—*Ferguson vs Riendeau*, M. L. R., 2 S. C., p. 136.

6. That when a traveller, lodging in an hotel, has spent the evening in drinking at the bar room with a number of inhabitants of the locality and has ordered intoxicating beverages in his turn as his treats, the exception mentioned in C. C. 1481 does not apply and the tavern keeper has no action against him for the price of such liquors.—WURTELE, J.—*Lapierre vs Brière*, 10 L. N., p. 387.

CHAPTER SECOND.

OF THE CAPACITY TO BUY OR SELL.

1482. The capacity to buy or sell is governed by the general rules, relating to the capacity to contract, contained in chapter first, of the title *Of Obligations*.—C. N., 1594. [II. 41.]

Amendments:—Notwithstanding all the provisions of the civil code, and namely, the articles 297, 298, 343 and 953, it shall be lawful for all coporations, aggregate or sole, communities, institutes, tutors, curators, executors, administrators, and all other representatives or persons whatsoever not only for themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether born or unborn, lunatics, idiots, *femes-covert*, or other person or persons who are or shall be seized, possessed of, or interested in any lands or grounds which the company may require for the purposes of

Digitized by Google

the said road, to contract for, sell and convey to the said company all or any part of such lands so required by the company for such purposes, and all contracts, agreements, sales, conveyances, and assurances so to be made, shall be valid and effectual in law, to all intents and purposes whatsoever, any law, statute, usage or custom to the contrary thereof in any wise notwithstanding ; and all such corporations or communities, or all persons whatsoever, so conveying as aforesaid, are hereby indemnified for what they, or any of them, shall respectively do, by virtue of or in pursuance of this act.—Q. 33 Vict., cap. 32, s. 42.

The Provincial Act intituled " An Act respecting Railways " containing somewhat similar powers, was itself repealed by the section of the Act hereinafter next cited.—Q. 32 Vict., cap. 51, s. 9, s. s. 3.

3. All corporations and persons whatsoever, usufructuaries, institutes, guardians, curators, executors, administrators, and all other trustees whatsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes covert*, or other persons, seized, possessed of, or interested in any lands, may contract, sell and convey unto the company all or any part thereof ; provided always that, in all cases in which the parties, above mentioned, shall have no legal right to sell and convey the ownership of the said lands, they shall, after having given due notice to the parties interested obtain, from a judge of the Superior Court, permission to sell such lands ; and the said judge shall give the necessary orders for the investment of the price thereof, in such manner as he shall deem expedient and in accordance with the laws of the Province to protect the rights of the owner of such land.—Q. 43-44 Vict., cap. 43, s. 9, s.s. 3.

The Dominion Act (31 Vict. cap. 68, s. 9, s. s. 3) intituled " An Act respecting Railways" containing somewhat similar provisions to the preceding enactment, was itself repealed by the Consolidated Railway Act, 1879 (D. 42 Vict. cap. 9, s. 9, s. s. 3) which now forms part of the Revised Statutes of Canada and reads as follows :

All tenants in tail, or for life, *grevés de substitution*, guardians curators, executors, administrators, trustees and all persons whomsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes coverts*, or other persons, seized, possessed of or interested in any lands, may contract, sell and convey to the company all or any part thereof.

Digitized by Google

In all cases in which the persons hereinbefore enumerated have no right in law to sell or convey the rights of property of the said land, the said persons shall obtain from a judge, after due notice to the persons interested, the right to sell the said land; and the said judge shall give such orders as are necessary to secure the investment of the purchase money in such a manner as he deems necessary, in accordance with the law of the Province to secure the interest of the owner of the said land.—R. S. C., cap. 109, s. 8, s. s. 506.

See also amendments noted at C. C. 298 and 299 relative to the disposition of the property of minors.

1483. Husband and wife cannot enter into a contract of sale with each other. — Pothier, *Don entre mari et femme*, n. 78; Dumoulin, sur l'article 156; C. P., n. 5; 12 Toullier, n. 41, p. 62; 6 Marcadé, sur l'art. 1595, p. 185; C. C Vaud, 1125; C. C. P., 282; 2 Pigeau, 197; C. N., 1595. [II. 41.]

DECISIONS:—1. Un acte authentique passé entre les époux et fait de bonne foi et pour valable considération, en paiement des reprises matrimoniales dues à la femme en vertu d'un jugement en séparation, est un acte valide et légal.—Q B.—*Legault & Bourque*, 15 L. C. J., p. 72.

2. A husband and wife, fraudulently and without notice, contrived to convey his real estate through a third party into her name, giving her at the same time a notarial power of attorney or mandate by which he authorized her "to sell, "transfer and dispose of her immoveable property situated in the city of Mont- "real or elsewhere." She then owned no other real estate except that so transferred to her. Acting under the mandate, she mortgaged the property so conveyed to her and then standing in her own name. After receiving the money on said mortgage, the husband and wife, by means of another third party and another set of deeds, contrived to have the property transfered back into the name of the husband. The husband being sued, pleaded that she was not authorized and that the mandate was general and insufficient to bind him.—*Held*:—Under the circumstances, the husband mortgaged his own property through his wife as mandatory, and he cannot plead his own fraud to deprive his mandate of effect and that, the lender did not require to bring an action to set aside the fraudulent deeds by which the husband, through a third person, conveyed his property into the name of his wife, as the husband and wife by another set of deeds had reconveyed the property back into the name of the husband, and a direct action against the husband will lie on the deed of mortgage passed by the wife while she held the property, and husband and wife so conspiring fraudulently to obtain money will be jointly and severally condemned to pay back the amount, and the mortgage will be held good as against the property of the husband.—JOHNSON, J. *Buchanan vs McMillan*, 20 L. C. J., p. 105.

1484. The following persons cannot become buyers, either by themselves or by parties interposed, that is to say:

Digitized by Google

Tutors or curators, of the property of those over whom they are appointed, except in sales by judicial authority;

Agents, of the property which they are charged with the sale of;

Administrators or trustees, of the property in their charge, whether of public bodies or of private persons;

Public officers, of national property, the sale of which is made through their ministry.

The incapacity declared in this article cannot be set up by the buyer; it exists only in favor of the owner and others having an interest in the thing sold.—*ff* L. 34, § 7; L. 46, *De contr. empt.;* Cod., L. 5, *De contr. empt.;* Lamoignon, *Arrêt.*, tit. 4, art. 96, tit. 22, art. 27, p. 143; Ord. 1524, art. 23; Ord. Orl., art. 54; Ord. 1629, art. 94; Domat, liv. 1, tit. 2, sec. 8, *Introd.*, § et nn. 1, 2; Pothier, *Vente*, 13; 6 Marcadé, 190-193; 1 Troplong, *Vente*, nn. 187 et seq.; C. L., 2421, 2422; C. C. Vaud, 1126, 1127; C. N., 1596, 1597. [II. 41.]

Amendments:—See the act intituled an "Act respecting Trusts."—Q. 42-43 Vict., cap. 29, as amended by the act intituled "An act to "amend the Act respecting Trusts and the Act defining the invest- "ments to be made by administrators (42-43 Vict., cap. 29 and 30).—Q. 46 Vict., cap. 24.

DECISIONS:—1. A person in his capacity as curator, cannot purchase from himself individually, and in his own right, a debt, and cannot indirectly, with the assistance of a *prête-nom* do an act which be cannot do directly in his own name.—Q. B.—*Mackenzie & Taylor*, 9 L. C. J., p. 113.

2. The sale made of a substituted property for debts created by the author of the substitution, or for other debts or charges anterior to the substitution, is a valid sale, and purges the substitution.—The institute can legally become purchaser of the property *délaissé* by him for the debts of his *auteur*.—Q.B.—*McIntosh & Bell*, 12 L. C. J., p. 121.

3. The provisions of the Civil Code prohibiting agents and others from becoming buyers of the property, which they are charged with the sale of, apply to subordinates.—C. R.—*Wicksteed vs Corporation of North Ham*, 15 L. C. J., p. 249, 3 R. L., p. 448.

4. Un curateur à une substitution ne peut, par personne interposée, se porter adjudicataire des immeubles de la substitution, vendus par autorité de justice.—Q. B.—*Benoit & Benoit*, 8 R. L., p. 425.

5. L'intimée, appellée à la substitution créée par le testament de son père réclame par l'action pétitoire, de l'appelant un immeuble faisant partie des biens de la dite substitution. L'appelant, dans sa défense, allègue qu'il a acquis cet immeuble à une vente judiciaire à la poursuite d'un créancier préférable à la substitution, laquelle se trouve en conséquence purgée par le décret. Réponse de l'intimée que cette créance n'était préférable à la substitution que par l'enrégistrement tardif du testament créant la dite substitution, et que l'appelant, ayant été son tuteur, ne pouvait se prévaloir de ce défaut. Aucune allégation de la connaissance du testament par l'appelant n'est faite dans la dite réponse.—JUGÉ:

Digitized by Google

—Que l'appelant, ayant invoqué à l'encontre de l'action pétitoire de l'intimée, un titre bon et valable à sa face, l'intimée est tenue d'en démontrer la nullité, et, qu'en l'absence d'allégation et de preuve que l'appelant, tuteur de l'intimée, connaissait l'existence de ce testament, il est bien fondé à en invoquer l'enrégistrement tardif. (C. C. 940).—Q. B.—*Terrien & Labonté*, 2 Q. B. R., p. 90.

6. That when power was given by a will to two of the executors to sell immoveable property belonging to the estate, a sale by two of the executors to one of themselves was void.—PRIVY COUNCIL.—*Carter & Molson*, 10 App. Cas., p. 664, 8 L. N., p. 281, R. A. C., p. 889.

1485. Judges, advocates, attorneys, clerks, sheriffs, bailiffs and other officers connected with courts of justice, cannot become buyers of litigious rights which fall under the jurisdiction of the court in which they exercise their functions; C. N. 1597. [II. 41.]

DECISIONS:—1. Le fait qu'un shérif se serait porté adjudicataire d'un immeuble par personnes interposées, ne rend pas le décret nul de plein droit, mais annulable.—C. R.—*Armstrong vs Barrette*, 2 R. L., p. 98.

2. Que la défense que fait C. C. 1485 aux officiers attachés aux tribunaux d'acquérir des droits litigieux qui sont de la compétence du tribunal dans le ressort duquel ils exercent leurs fonctions, est d'ordre public, et crée une nullité qui doit être proposée, mais qui n'a pas besoin d'être prononcée.—Que l'achat d'une dette qui a été payée mais dont il n'y a pas de quittance, est, pour l'acquéreur, qui a été informé du paiement, celui d'une dette litigieuse.—C. R.—*Côté vs Haughey*, 7 Q. L. R., p. 142, 4 L. N., p. 280.

CHAPTER THIRD.

OF THINGS WHICH MAY BE SOLD.

1486. Every thing may be sold which is not excluded from being an object of commerce by its nature or destination or by special provision of law.—C. C., 1059-1061; Pothier, *Vente*, 10, 11; C. N., 1598. [II. 41.]

DECISIONS:—1. La dot consistant en une somme d'argent est aliénable par la femme séparée de biens de son mari et de lui dûment autorisée à céder cette somme à un tiers.—MONK, J.—*Gauthier vs Dagenais*, 7 L. C. J., p. 51.

2. To an action instituted by the *cessionaire* of a claimant under the "Rebellion Losses Act" for the recovery of the sum of £183 awarded to the defendant, it was pleaded that the transfer was illegal, as being a transfer of no claim exigible in law—that there was no *créance* exigible in law. By the terms of the Act itself, it was held that the claim was transferable.—C. R.—*Pacaud vs Bourdages*, M. C. R., p. 123.

3. Une rente annuelle léguée à titre d'aliments et déclarée insaisissable par le testateur, peut être cédée par le légataire.—Le légataire est non-recevable à demander la rescision de cette cession, sur le principe que l'insaisissabilité et la

Digitized by Google

nature alimentaire de cette rente comporte son incessibilité.—MACKAY, J.—*Berlinguet vs Prévost*, 16 L. C. J., p. 55.

As to the alienation of effects declared *insaisissable*, see certain of the cases noted at C. C. 760 and 831.

1487. [The sale of a thing which does not belong to the seller is null, subject to the exceptions declared in the three next following articles. The buyer may recover damages of the seller, if he were ignorant that the thing did not belong to the latter.]—1 Troplong, *Vente*, nn. 230, 231, 236; 6 Marcadé, p. 208, sur l'art. 1599; Cadrès, pp. 196-7; C. L., 2427; C. C. Vaud, 1130; C. N., 1599. [II. 43.]

DECISIONS:—1. The lessee of a piano sold it to a person who sold it to the defendant. In an action *en revendication* by the lessors and proprietors against the second purchaser (the present defendant) it was held that the defendant could not set up a possession of some months and his good faith as a title against the plaintiffs, but that there must be a possession of three years in good faith in order to acquire moveable property by prescription.—The doctrine that *en fait de meubles possession vaut titre*, over-ruled as not applicable in this case.—C. R. —*Gould vs Cowan*, 17 L. C. R., p. 46.

2. Where a moveable has been leased by the owner and the lessee had sold it to a third party, an action *en revendication* by the lessor to recover it back will be maintained, although the possessor may have purchased in good faith.—SMITH, J.—*Mathews vs Senécal*, 7 L. C. J., p. 222.

3. After the advertisement of a writ of attachment in insolvency, the public is bound to know the incapacity of an insolvent to sell any of his property.—This incapacity continues and the public is bound to know it, during the pendency of an appeal from a judgment which quashed the attachment.—A sale made by an insolvent of property, even when not seized under the attachment, in consequence of its being then secreted, is absolutely null and not annulable only.—The guardian to the attachment under the writ can revendicate in the hands of the purchaser such property when so sold.—The purchaser cannot claim to be reimbursed the price paid to insolvent.—Q. B.—*Mallette & Whyte*, 12 L. C. J., p. 229.

4. A person who has leased a piano belonging to him, has a right to revendicate it after it has been sold by a third party to cover advances made by such third party to the lessee.—BADGLEY, J.—*Nordheimer vs Fraser*, 1 L. C. L. J., p. 92.

5. The plaintiffs revendicated a piano-forte which had been purchased by the defendants at a judicial sale of the goods of a party to whom the plaintiffs had leased the instrument. This sale was made by the bailiff in a different district from that in which the instrument was seized:—*Held*, that the sale was null and void, and could not convey any right of property as against the proprietors.—Q. B.—*Nordheimer & Duplessis*, 2 L. C. L. J., p. 105.

6. A contract by which a person purports to sell an immoveable which he erroneously believes to belong to him, but which in reality is not his property, is a *nudum pactum*.—Q. B.—*Roy & Dion*, 8 R. L., p. 259.

7. Where the vendor sold goods to be paid for by monthly instalments, on the understanding that no title was to pass, until all the instalments were paid,

Digitized by Google

and the vendee sold the same to a third party, who knew the facts, before complete payment was made, it was held that the vendor was entitled to revendicate. —TORRANCE, J.—*Tufts vs Brownrigg*, 2 L. N., p. 323.

8. A husband, after the death of his wife, sold a property which belonged to the community and of which his wife had by will given him the usufruct of her share. The purchaser was notified by those to whom the wife's half of the property had been bequeathed, of their claims and thereupon sought and succeeded in annulling the sale.—Q. B.—*Mongeau & Dubuc*, 30 L. C. J., p. 25.

9. An obligation having been transferred, merely by way of collateral security for a debt, the pledgee sold it to defendant, who with knowledge of all the facts, collected it from debtor. It was held, that the sale by the pledgee was a nullity and that the pledgor might maintain against the defendant an action to recover the amount received by him in excess of the debt secured by the pledge.—C. R.—*Leduc vs Girouard*, M. L. R., 2 S. C., p. 470.

10. Where a man had leased a horse for a period of time, on the condition that, if the rent were paid duly up to the end of the period, the horse should be the property of the lessee, and the latter sold it before such time had expired and the payments had been completed, it was held that the lessor could revendicate it in the vendee's hands.—MATHIEU, J.—*Bertrand vs Gaudreau*, 12 R. L., p. 154.

11. Que la vente d'effets saisis par le saisi à un tiers de bonne foi, doit être assimilée à la vente d'effets volés, et que le créancier saisissant ou le gardien a le droit de les revendiquer entre les mains du tiers acquéreur.—RAINVILLE, J.—*Franey vs Costello*, 12 R. L., p. 300.

12. Que lorsque le gardien d'un cheval, harnais et voiture saisis, a placé dans une écurie de louage, tels cheval, harnais et voiture, le propriétaire de telle écurie de louage sachant que tels effets n'appartiennent pas au gardien et qu'il causera un certain tort à celui en faveur de qui est faite la saisie, ne peut les vendre et s'approprier le produit de la vente en paiement de la pension et garde de tels effets, sans s'exposer à des dommages.—C. R.—*Morris vs Miller*, 14 R. L., p. 659, M. L. R., 2 S. C., p. 476, 31 L. C. J., p. 209.

See also cases noted at C. C. 1478.

1488. [The sale is valid if it be a commercial matter, or if the seller afterwards become owner of the thing.] —Troplong, *Vente*, n. 236; 6 Marcadé, p. 208; Cadrès, *loc. cit.* [II. 43.]

Amendment: Whereas doubts have been raised as to the right of the creditor who has received a pledge in this Province, to be maintained in the possession thereof, against the owner when the same was obtained, in good faith, from a trader dealing in similar articles; and that it is important to remove such doubts; therefore, Her Majesty by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. Articles 1488, 1489 and 2268 of the Civil Code, apply to the Contract of Pledge.—Q. 42-43, Vict., cap. 19.

Digitized by Google

DECISION :—Where there is a power, by law, to sell, a purchaser may obtain from the vendor even as against the true owner, a good title, but that cannot extend, by implication to a pledge.—PRIVY COUNCIL.—*City Bank & Barrow*, 5 App. Cas. p. 664.

1489. If a thing lost or stolen be bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without reimbursing to the purchaser the price he has paid for it.—C. N., 2280; Lamoignon, *Arrêtés*, tit. 21, art. 96; Pothier, *Cheptels*, nn. 45, 48, 50; Troplong, *Vente*, n. 42; Merlin, Rép., vo. *Vol*, sec. 4, § 1, n. 2; C. C., Vaud, 1682; C. C., 2268. [II. 43.]

Amendment :—See amendment noted at C. C. 1488.

DECISIONS :—1. Possession of moveables presumes title or right of property therein, and therefore, (except in cases of theft, violence, and perhaps accidental loss, the purchaser of moveables, *bona fine*, in the usual course of trade, acquires a right of property in them, although they may have been sold by one who was not the owner thereof.—Q. B.—*Fawcet & Thompson*, 6 L. C. J., p. 139.

2. The purchaser of a lost horse, *bona fide*, in the usual course of trade, in a hotel yard in Montreal, where horse dealers are in the habit of congregating and selling daily a large number of horses, acquires no right of property therein as against the owner who lost it; and, although the purchaser be a resident of the United States and in possession there of the horse claimed, he may nevertheless be sued in Montreal for the value of the horse, on being personally served with process there.—SMITH, J.—*Hughes vs Reed*, 6 L. C. J., p. 294.

3. Une vente faite par un failli, après l'émanation d'un bref en liquidation forcée et la publication des avis de faillite, est radicalement nulle, et dans le cas de telle vente l'acquéreur ne peut invoquer sa bonne foi, et demander le remboursement du prix d'achat en vertu de l'article 1489 du Code Civil.—Q. B.—*Mallette & White*, 1 R. L., p. 711.

4. Une cour d'hôtellerie où se font des encans de chevaux n'est pas considérée comme foire ou marché dont il est parlé en l'article 1489 C. C.—Pour que l'acheteur de bonne foi, dans une de ces cours, d'un objet volé, ait droit de réclamer le prix d'achat sur le propriétaire qui le revendique, il faut que cette vente ait eu lieu par vente publique et non privément.—BEAUDRY, J.—*Guy vs Booth*, 4 R. L., p. 565.

5. Where a horse was stolen and sold at public auction, the purchaser at auction in good faith has no right or title to the horse, but must restore the same to the original owner, his only recourse being against the seller for recovery of the purchase money.—BERTHELOT, J.—*Langevin vs McMillan*, 9 L. C. J., p. 105.

6. Notwithstanding anything contained in articles 1488 and 2268 of the Civil Code of Lower Canada, a valid sale or pledge cannot be made of stolen goods, except in the cases mentioned in article 1489, so as to divest the real owner of his right to reclaim them from the purchaser or pledgee without reimbursing the price paid for or advances made on such goods, although the purchaser or pledgee may have bought or made advances on the stolen goods *bona fide*, in the ordinary course of his business.—The words "nor in commercial matters generally" in article 2268 do not protect a trader acquiring stolen goods in

Digitized by Google

any commercial transaction, whether from a trader dealing in similar articles or not, but apply, apparently, to cases where the possession of the goods is obtained in a commercial transaction, whether by sale or otherwise, but under the same circumstances by which a sale would be protected under article 1489.—Q. B.—*Cassils & Crawford*, 21 L. C. J., p. 1.

7. A farmer selling cordwood from his land is a trader dealing in similar articles, within the meaning of C. C. 1489. Wood cut and sold on land held under a "location ticket" containing a prohibition to cut wood, is not stolen property within the meaning of the above cited article.—Q. B.—*Canada Paper Company & British American Land Company*, 5 L. N., p. 310.

See also cases noted at C. C. 2268.

1490. If the thing lost or stolen be sold under the authority of law, it cannot be reclaimed.—C. S. L. C., c. 66; C. L., 3474. [II. 43.]

DECISION:—Qu'en l'absence de fraude ou de collusion, un tiers, propriétaire de meubles qui ont été saisis et vendus judiciairement, n'a aucun droit en revendication contre l'adjudicataire qui en a payé le prix : son recours est sur le produit, s'il n'est pas encore distribué ou, s'il l'est, contre le saisissant pour value du meuble. (C. C. P. 599).—MATHIEU, J.—*Mackay vs Vigeant*, M. L. R., 1 S. C., p. 382.

CHAPTER FOURTH.

OF THE OBLIGATIONS OF THE SELLER.

SECTION I.—GENERAL PROVISIONS.

1491. The principal obligations of the seller are: 1. The delivery, and, 2. The warranty of the thing sold.—Pothier, *Vente*, 41, 42; C. N., 1603. [II. 43.]

SECTION II.—OF DELIVERY.

1492. Delivery is the transfer of a thing sold into the power and possession of the buyer.—Domat, liv. 1, tit. 2, sec. 2, n. 5; C. N., 1604. [II. 43.]

DECISIONS:—1. The actual possession by a purchaser of a certain quantity of timber amounts to a delivery in law, though the timber has not been culled or counted.—C. R.—*Levey & Turnbull*, 1 L. C. R., p. 21.

2. The purchaser of an immoveable property who has neither had *seizin* nor possession, cannot maintain the petitory action.—BOWEN & DUVAL, JJ.—*Brochu vs Fitzback*, 2 L. C. R. p. 7.

Digitized by Google

3. The Defendant undertook to deliver and the Plaintiff agreed to receive, 14,000 feet of birch timber, merchantable and averaging a certain size, the said timber to be piled on the Defendant's wharves during the winter of 1844-5 and to be delivered, as required by the Plaintiff, during the ensuing season of navigation. A quantity of timber, piled upon the wharves of the Defendant, was destroyed by fire during the winter before it had been measured as between the Plaintiff and Defendant. *Held* :—That there had been no delivery of any timber by the Defendant to the Plaintiff; 1o. Because there had been no measurement of the timber; 2o. Because, therefore, the timber had not been ascertained to be of the requisite average size; 3o. Because the timber had not been ascertained to be of the required quality.—Bowen & Meredith, JJ.—*Levey vs Loundes*, 2 L. C. R. p. 257.

4. In cases of sales of waste lands tradition is necessary to convey the right of property.—When the purchaser by private sales of such lands does not take possession of the same, such lands may be legally seized and sold as belonging to the vendor, and in such case the purchaser becomes seized of such lands to the exclusion of the purchaser who has neglected to take possession.—Q. B.—*Mallory & Hunt*, 2 L. C. R., p. 345.

5. A sale of moveable effects by a notarial deed, which declares that tradition of the whole takes place by the delivery of a chair and of a table, does not vest the property in the vendee, and a creditor of the vendor posterior to the sale may cause the seizure and sale of the same effects upon the vendee.—Q. B.—*Bonacina & Seed*, 3 L. C. R., p. 446.

6. Want of possession and want of consideration are strong indications of fraud.—Delivery of possession is only presumptive evidence of honesty, but non-delivery is strong evidence of fraud.—A subsequent creditor may plead simulation of previous deed for property which never passed from the debtor.—Bowen & Badgley, JJ.—*Barbour & Fairchild*, 6 L. C. R., p, 113.

7. A judicial sale operates a real tradition and the purchaser is duly seized of and may transmit possession.—Q. B.—*Loranger & Boudreau*, 9 L. C. R. p. 385.

8. The Plaintiff seized a quantity of timber in the hands of a third party as being the property of the Defendant and another party who was surety of the Defendant for the construction of a church for which the timber was intended, intervened, and claimed it as having been transferred by the Defendant to him. The only proof of the delivery was that he and the Defendant had stood on the top of a hill overlooking the place where the timber was piled, and that the Defendant then said to the surety, pointing to the timber, "I give it to you." This was held to be insufficient to constitute a delivery.—C. R.—*Chartrand vs Joly*, 1 L. C. L. J., p. 27.

9. When goods are stored in a warehouse, a written order by the seller of the goods, directing those in whose care the goods are to deliver the same to the buyer, amounts in law to a good and valid delivery of such goods.—Q. B.—*Fraser & Roche*, 8 L. C. R., p. 288.

10. To entitle opposants, who claimed as proprietors by purchase, to withdraw machinery from sale and execution, the same having been seized as belonging to the defendants, an actual *déplacement* and delivery must be proved, which not having been done, their pretentions could not be upheld.—Berthelot, J.—*Ash vs Willett*, 4 L. C. J., p. 301.

11. Les défendeurs ayant acheté de la fleur, livrable aux magasins des

Digitized by Google

demandeurs de temps à autre, à la demande des acheteurs, la vente est parfaite, quoiqu'il n'y ait pas tradition au moment du contrat, et la fleur demeurée aux dits magasins est la propriété des acheteurs et à leurs risques et périls.—SMITH, J.—*Boyer vs Prieur*, 7 L. C. J., p. 52.

12. The constructive delivery contained in the following words "said timber " to be delivered at Ottawa, where the same shall be manufactured, and to be " considered as delivered when the same is sawed and then to belong to and to " be the property of the parties of the second part," is not valid, as regards a third party, without notice and actual delivery.—Q. B.—*White & Bank of Montreal*, 12 L. C. J., p. 189.

13. The delivery contemplated by the 12th section of the Insolvent Act of 1864, is an actual, complete, and final one, and consequently the delivery of goods to a purchaser's shipping agent in England, for transmission to the purchaser in Canada, and the entering of the goods in bond here, by the purchaser's custom house broker, is not such a delivery as will defeat the vendor's remedy, under the 176th and 177th articles of the Custom of Paris.—BERTHELOT, J.—*Hawksworth vs Elliot*, 10 L. C. J., p. 197.

14. The delivery of goods sold in England to a shipping agent there, employed by the vendees, who forward them to the vendees carrying on business in Montreal, is not such a delivery as is contemplated by the 12th section of the Insolvent Act of 1864, and such goods may be legally revendicated by the unpaid vendors in the hands of the Grand Trunk Railway here, although more than fifteen days have elapsed since such delivery to the shipping agent.—MONK, J.—*Bank of Toronto vs Hingston*, 12 L. C. J., p. 216.

15. La réception ici de marchandises achetées en Angleterre, par leur dépôt dans une maison d'entrepôt, sur une entrée du courtier de douane de l'acheteur, est une livraison qui privera le vendeur de son privilége en vertu des articles 176 et 177 de la Coutume de Paris, s'il n'est pas exercé dans les 15 jours de telle livraison.—Q. B.—*Brown & Hawksworth*, 2 R. L., p. 182.

16. Le vendeur d'une terre avec garantie de ses faits et promesses, est tenu de donner la possession à l'acheteur avant de pouvoir recouvrer le prix de vente —C. R.—*Foulds vs Laforce*, 5 R. L., p. 186.

17. A question as to when the goods sold (a crop of apples) should have been delivered, there being no time fixed by the contract.—Q. B.—*Courville & Leduc*, 30 L. C. J., p. 316.

18. Three months delay in delivery is not reasonable for goods to be delivered " shortly."—TORRANCE, J.—*Thompson vs Currie*, 4 L. N., p. 139.

See also cases noted at C. C. 1474 and 1493.

1493. [The obligation of the seller to deliver is satisfied when he puts the buyer in actual possession of the thing, or consents to such possession being taken by him, and all hindrances thereto are removed.]—*ff* L. 9, § 6 *De acquirendo rerum*; L. 21, L. 25, § 1, *De acquirendo poss.*; L. 47, *De contr. empt.*; L. 1, *De periculo rei vend.*; Cod. L., 1, L. 28, *De donat.*; Pothier, *Vente*, 313, 315; Domat, liv. 1, tit. 2, s. 2, n. 7; 6 Marcadé, pp. 221-2; 5 Boileux, 643; 1 Troplong, *Vente*, nn. 675-6-7-8; C. L., 2455; C. C. Vaud, 1136; C. N., 1605. [II. 45.]

Digitized by Google

DECISIONS:—1. Advances on goods, under a written agreement, are made by A., a merchant in Upper Canada, to enable B., a contractor for lumber, to cut, and convey to the Quebec market, a quantity of timber upon the conditions, that as soon as dressed it should be considered as belonging and delivered to A, but conveyed to market at the risk and expense of B., and that A. should have the sale of the timber, and account to B. for any balance remaining, after a deduction of his disbursements and advances, including 10 per cent upon the latter, with a commission of 2½ per cent upon the sale:—*Held*, that after delivery to A., before it reaches the market without fraud or collusion with B., the timber could not be attached at the suit of B.'s creditors in payment of his debts, but the balance, if any, after a sale by A., can alone be arrested in his hands, under the process of the Court.—COURT OF APPEALS.—*Koughnet & Maitland*, Stuart's Rep., 357.

2. A. bought of B. certain articles of merchandize which were weighed and measured and paid for. It was agreed that the goods should remain in B.'s store until A., sent for them. *Held*:—That the creditors had rightly seized them as being the property of B., inasmuch as there had not been a delivery of the goods to A. so as to pass the property to him and that there should have been an absolute or actual delivery so as to pass the property in the goods to him.—Q. B.—*Nesbitt & Bank of Montreal*, 9 L. C. R., p. 193.

3. In a sale of timber growing, with the right to cut the same, the only tradition that the vendor can make at the time is to point out to the purchaser the trees to be cut.—BADGLEY, J.—*Russell vs Guertin*, 10 L. C. J., p. 133, 2 L. C. L. J., p. 42.

4. That the acceptance by a third party or middle-man of a delivery order granted by a vendor in favor of a vendee, for goods to be manufactured by the third party or middle-man, and the setting apart these goods as subject to the vendee's orders by the third party or middle-man, as they are manufactured, is a complete delivery, even though they should still be entered in the vendor's name in the books of the third party or middle-man.—Q. B.—*Broster & Hall*, 10 L. C. J. p. 205.

5. The constructive delivery contained in the following words, "said timber "to be delivered at Ottawa, where the same shall be manufactured, and to be "considered as delivered when the same is sawed, and then to belong to and to "be the property of the parties of the second part," is not valid as regards a third party, without notice and actual delivery.—Q. B.—*White & Bank of Montreal*, 12 L. C. J., p. 188.

6. Des matériaux pour bâtir, délivrés dans une rue en face de la bâtisse pour laquelle ils sont destinés et qui ont été payés par le propriétaire de la bâtisse, deviennent sa propriété absolue sans être actuellement incorporés dans la bâtisse.—C. R.—*McGauvran vs Johnson*, 4 R. L., p. 680.

7. Merchandize sold in England and transmitted by the vendors to the agent of the vendee at Liverpool and shipped by the latter to his mandator at Montreal, where the goods remain at the Custom House, have not been delivered to the buyer in the sense of C. C. 1493.—RAINVILLE, J.—*Thompson & Darling*, 9 R. L., p. 379.

8. Where the Respondent negotiated for the purchase of 268 packages of butter and some few were opened, and examined and subsequently 188 packages were received and paid for by Respondent and then, he finding the quality not satisfactory, stopped the weighing and receiving of the butter whereupon the

Digitized by Google

Appellants undertook to get the man who weighed and examined the butter for Respondent, to weigh the rest, and afterwards sent an invoice to Respondent for the whole parcel and subsequently, on the amount thereof not being paid, sued for the same, alleging that the butter was in their store at the Respondent's risk, it was held that the fact of inspecting a few of the packages did not bind the Defendant to pay the price of good, merchantable butter for an inferior article and the action was dismissed, and the obligation of delivery had not been fulfilled by the weighing so effected.—Q. B.—*Moore & Butters*, 30 L. C. J, p. 32.

9. Where the purchaser at a sheriff's sale was unable to obtain delivery of certain machinery contained in a sugar factory, the customs authorities having seized the same for duties, it was held that, whether the seizure were warranted or not, it effectually prevented the sheriff from giving possession and consequently relieved the purchaser from the obligation of paying the price.—PRIVY COUNCIL.—*Prévost & Compagnie de Fives Lille*, 10 App. Cas., p. 643, R. A. C. p. 1039.

10. Where flour was sold at Toronto, Ontario, to a purchaser in Sherbrooke, at $4.85 per barrel, delivered at Sherbrooke and Arthabaska, the flour was held to be at the risk of the vendor until it was delivered, and that the purchaser who had paid cash and did not examine the flour until a quantity had been sold in small lots to his customers, was entitled to recover from the vendor the difference in value between flour of the quality ordered and that which had been actually received, the same having become damaged *in transitu*.—Q. B.—*Taylor & Gendron*, M. L. R., 3 Q. B., p. 38.

See also cases noted at C. C. 1474 and 1492.

1494. The delivery of incorporeal things is made by the delivery of the titles, or by the use which the buyer makes of such things with the consent of the seller.—Domat, liv. 1, tit. 2, sec. 2, n. 7 ; Pothier, *Vente*, n. 316 ; C. L., 2547 ; C. N., 1607 ; C. C., 1570. [II. 45.]

DECISIONS:—1. Actual tradition according to the old law of France is not absolutely necessary to convey to the purchaser the right of property, and a feigned or symbolical tradition, such as the delivery of titles, letters patent, plans, &c., &c., may be sufficient, and in consequence the sale made by J. R. to P. R. and others in 1804 of an extent of land to him granted in 1799 by letters patent was rendered effective by the symbolical tradition arising from the delivery of the titles and plans of the land in question.—Q. B.—*Stuart & Bowman*, 3 L. C. R., p. 309.

2. Qu'un acte de vente non signé par l'acquéreur ne fait pas preuve que ce dernier a le droit de consentir une hypothèque sur le terrain.—Q. B.—*Banque Union & Nutbrown*, 14 R. L., p. 64, 8 L. N., p. 76.—C. R.—10 Q. L. R., p. 287.

1495. The expenses of the delivery are at the charge of the seller, and those of removing the thing are at the charge of the buyer, unless it is otherwise stipulated.—Pothier, *Vente*, nn. 42 et seq. ; C. L., 2459 ; C. N., 1608. [II. 45.]

Digitized by Google

1496. The seller is not obliged to deliver the thing if the buyer do not pay the price, unless a term has been granted for the payment of it.—*ff* L. 13, § 8, *De act. empti ;* Domat, liv. 1, tit. 2, sec. 3, n. 8 ; Pothier, *Vente*, 50, 63, 65 ; C. L., 2463 ; C. N., 1612. [II. 45.]

DECISIONS:—1. Une partie qui se fait mesurer et couper des marchandises et qui offre ensuite un accompte, a droit, sur le refus du marchand de livrer toutes les marchandises, de choisir parmi les effets achetés pour la valeur de cet accompte ou de se faire rembourser le montant payé.—Le marchand ne peut retenir le montant payé, sous prétexte de l'insolvabilité de l'acheteur, et sur le motif qu'il représente la valeur des marchandises coupées, malgré qu'il offre de les remettre.—JOHNSON, J.—*Walsh vs Bernard*, 4 R. L., p. 659.

2. La vente sans terme, même suivie de tradition, ne transférant la propriété, qu'en autant que le vendeur est payé, celui-ci peut, s'il n'a pas été payé, revendiquer dans les huit jours de la livraison, la chose vendue, si elle est encore entre les mains de l'acheteur (C. C. 1554, 1998 et 1999.)—Q. B.—*Blagdon & Lebel*, 5 Q. L. R., p. 87.

3. Que le vendeur n'est pas tenu de délivrer la chose, si l'acheteur n'en paye le prix, à moins que le vendeur ne lui ait accordé un délai pour le paiement. —MATHIEU, J.—*Contant vs Normandin*, 11 R. L., p. 479.

4. In a sale the expression "prompt cash" means that payment must be made on delivery of the goods.—Q. B.—*Cox & Turner*, 30 L. C. J., p. 253.

5. Que dans une vente pour argent comptant, si l'acheteur refuse de payer comptant et n'offre que les valeurs commerciales la vente est en loi sans effet et que dans le cas où, sous ces circonstances, l'objet vendu a été livré, le vendeur restant propriétaire peut le faire saisir ou revendiquer.—OUIMET, J.—*Pominville vs Deslongchamps*, M. L. R., 3 S. C. p. 195.

1497. Neither is the seller obliged to deliver the thing, when a delay for payment has been granted, if the buyer since the sale have become insolvent, so that the seller is in imminent danger of losing the price, unless the buyer gives security for the payment at the expiration of the term.—Pothier, *Vente*, 67 ; Domat, liv. 1, tit. 1, sec. 2, n. 22 ; C. L., 2464 ; C. N., 1613. [II. 45.]

1498. The thing must be delivered in the state in which it was at the time of sale, subject to the rules relating to deterioration contained in the title *Of Obligations*.

From the time of sale all the profits of the thing belong to the buyer.—Authorities under C. C. 1150 ; Pothier, *Vente*, n. 47, *Bail à rente*, n. 48 ; C. L., 2465 ; C. C. Vaud, 1145 ; C. N., 1614. [II. 45.]

DECISIONS:—1. If property after a sale perfected, is burnt by accident, before delivery, the loss falls on the purchaser.—K. B.—*McDonall vs Fraser*, Stuart's Rep., p. 101.

2. Que le vendeur d'instruments d'agriculture est tenu, en l'absence des conventions contraires, de livrer ces instruments à l'acheteur en bon ordre et en

Digitized by Google

état de fonctionner convenablement, et que l'acheteur d'un tel instrument, qui lui est livré en mauvais ordre au temps où il en a besoin pour les travaux, peut en acheter un autre, et, lorsqu'il est poursuivi pour le prix de cet instrument, demander la résiliation de la vente.—MATHIEU, J.—*McCormick vs Neville*, 12 R. L., p. 617.

1499. The obligation to deliver the thing comprises its accessories and all that has been designed for its perpetual use.—*ff* L. 17, § 7, *De act empti;* Pothier, *Vente*, 47; *Intr. générale aux Cout.*, 47, 48; C. C., 1024; C. L., 2466; C. N., 1615. [II. 45.]

DECISIONS:—1. Gas and water pipes are fixtures, but they may be removed at the expiration of his lease by the tenant who has fitted them up.—The sale of a house with its appurtenancies and dependencies will include the gas and water pipes then fitted up in the same, unless specially reserved by the vendor.—TASCHEREAU, J.—*Atkinson vs Noad*, 14 L. C. R., p. 159.

2. Que la vente des dettes actives ou "*book debts*," d'un commerçant en faillite à l'encan public, ne comprend pas les livres de compte eux-mêmes, mais simplement la vente des créances du failli.—C. R.—*Guindon vs Fatt*, M. L. R., 3 S. C., p. 79.

1500. The seller is obliged to deliver the full quantity sold as it is specified in the contract, subject to modifications hereinafter specified.—*ff* L. 51, *De contr. empt.*; L. 7, § 1, *De periculo et com. rei vend.;* Pothier, *Vente*, 250-1-2; C. N., 1616. [II. 45.]

DECISIONS:—1. A sale of land by given boundaries, for a fixed sum, although a quantity is stated in the description, is a sale *en bloc* or *per aversionem* and not by measurement. The vendor by such a sale conveys all the property within the specified limits and cannot reclaim any part of it, under pretence of there being a surplus, unless it had been obtained from him by the fraud of the purchaser.—In such a case the law gives the surplus to the vendee, in this respect differing from the Code Napoleon which has established a new rule.—Q. B.—*Herrick & Sixby*, 8 L. C. J., p. 324, 17 L. C. R., p. 146.

2. That in a sale of coal, where the buyer accepted, without reweighing, coal from a ship which he had, by his contract, the right to take at the weight specified in the bill of lading without reweighing, or to have the same reweighed, it was held that he forfeited his right in respect to any deficiency that there might be in the weight of the coal.—Q. B.—*Canada Shipping Co & Victor Hudon Cotton Co.*, 5 L. N., p. 309.—Confirmed in SUPREME COURT, 13 S. C. R., p. 403.

3. T. brought an action to recover balance of purchase money of land sold by him to appellants, who pleaded that out of 3307 superficial feet sold to them, T. never delivered 710 feet and that so long as the full quantity was not delivered, they were not bound to pay. T. replied that he had delivered all the land sold to P. B. V. with their assent and approbation, together with other land sold to P. B. V. at the same time. At the trial it was proved that P. B. V. had purchased all the land owned by T. in that locality, but exacted two deeds of sale, one of 3307 feet for the appellants and another of the balance of the property for himself. By the deed to P. B. V. his land is bounded by that previously sold to the

Digitized by Google

company. P. B. V. took possession and the appellants fenced in what they required. HELD, affirming the judgments of the court below, that T. having delivered to P. B. V., the agent of the appellants, with their assent and approbation, the whole of the land sold to them, together with other land sold to P. B. V., at the same time, he was entitled to the balance of the purchase money, Taschereau, J., holding, that all the appellants could claim was a diminution of the price or a resiliation of the sale under C. C. 1501 and 1502 and that therefore their plea was bad.—SUPREME COURT.—*North Shore Railway Co. & Trudel*, 11 L. N., p. 36.

4. Que l'acheteur d'une certaine quantité de quarts de farine a une action contre le vendeur pour se faire rendre une partie du prix suivant évaluation si la farine vendue n'est pas de la qualité commune et si elle est sure, et qu'ne action pour restitution de partie du prix intentée plus dé trois semaines après la vente sera maintenue suivant les circonstances de l'espèce.—Q. B.—*Taylor & Gendron*, 15 R. L., p. 294.

1501. [If an immoveable be sold with a statement, in whatever terms expressed, of its superficial contents, either at a certain rate by measurement, or at a single price for the whole, the seller is obliged to deliver the whole quantity specified in the contract; if such delivery be not possible, the buyer may obtain a diminution of the price according to the value of the quantity not delivered.

If the superficial contents exceed the quantity specified, the buyer must pay for such excess of quantity, or he may at his option give it back to the seller.]—Domat, liv. 1, tit. 2, sec. 11, n. 15; Pothier, *Vente*, 250-8; Voet, *Ad pandect., De contr. empt.*, n. 7; Pothier, *Vente*, 254-5; Merlin, Rép., vo. *Vente*, § 1, n. 10; 6 Marcadé, p. 235; 1 Troplong, *Vente*, n. 336, note 2; C. N., 1618; Pothier, *Vente*, 254; 1 Bourjon, p. 482; 2 Henrys, p. 548, liv. 4, ch. 6, quest. 85, nn. 1, 2; 1 Despeisses, p. 46, n. 15; Lapeyrère, lettre G, n. 6; 13 Pand. Franç., p. 81; 1 Troplong, *Vente*, nn. 338 et seq.; 5 Boileux, p. 655, note 2; C. N., 1617, 1618, 1619. [II. 47.]

DECISIONS:—1. The sale of an immoveable by the Sheriff which does not contain the extent of ground described, gives the purchaser the right of demanding a reduction of the price proportionate to the extent of the ground deficient.—DUVAL & MEREDITH, JJ.,—*Paradis vs Alain*, 2 L. C. R., p. 149.

2. A purchaser who has obtained a judgment against his vendor reducing the amount of the price of sale by reason of a *défaut de contenance* may bring an action *en déclaration de jugement commun* against an assignee of the balance of the price of sale who has given notification of the assignment.—Q. B.—*Ryan & Idler*, 7 L. C. R., p. 385.

3. The *adjudicataire* of a Fief sold at a Sheriff's sale having, through error as to the true extent of the property sold (which was described as containing 400 arpents, whereas it really only contained 188 arpents) paid the full price of his *adjudication*, and the Bank having, as an Opposant in the case, received the same, was bound to refund the excess.—Q. B.—*Desjardins & Banque du Peuple*, 10 L. C. R., p. 325, 8 L. C. J., p. 106.—SMITH, J.—9 L. C. R., p. 108.

Digitized by Google

4. Where in the description of a lot in a a deed of sale it was said to be "131 feet, towards Hope Street" and as a matter of fact there was only a frontage of 100 feet but the back of the premises extended to 175 feet and the lot contained even more than was intended to be conveyed, the deed giving a full description of the boundaries on each side, it was held that the sale was by measurement and that the vendor could not be allowed to take money for what he did not deliver.—SUPERIOR COURT A. D. 1830 (Judge's name not given.)—*Patterson vs Usborne*, 3 R. L., p. 458.

5. L'acquéreur d'un immeuble dans la contenance duquel il y avait déficit, pourrait réclamer du cessionnaire du prix de vente, une diminution sur le prix cédé proportionnelle au défaut de contenance.—L'acceptation du transport ne rendait pas le débiteur non-recevable à opposer au cesssionnaire les exceptions qu'il aurait pu opposer au créancier cédant.—SMITH, J.—*Masson vs Corbeille*, 2 L. C. J., p. 140.

6. Where land sold is found to be less than the alleged extent, the consideration money will be proportionably reduced.—BADGLEY, J.—*Walton vs Dodds*, 1 L. C. L. J., p. 66.

7. A lot of land was sold under a deed as containing 40 arpents in superficies, more or less, without guarantee of precise measurement, but giving the different boundaries of the lot. The purchaser found on measuring the lot that it only contained 30 arpents in superficies.—*Held:* That such sale was of a block of land within defined limits and not a sale *ad mensuram*.—MACKAY, J.—*Munro vs Lalonde*, 13 L. C. J., p. 128.

8. L'adjudicataire à une vente par le shérif d'un terrain de 49 acres, qui n'a pas la quantité déterminée, a droit à une réduction *pro rata* du prix d'adjudication. *Semble* qu'il en serait autrement de la vente d'un corps certain.—COURT OF APPEALS.—*Doutre & Elvidge*, 1 R. C., p. 120.

9. An *adjudicataire* at sheriff's sale of real estate, sold under the provisions of the Code of Civil Procedure of Lower Canada, cannot legally claim to be refunded by way of collocation on the proceeds of the sale, a portion of the price paid, on the ground that the property proved to be of considerably less extent than advertised, in consequence of an adjoining property having been erroneously included in the description.—Under any circumstances the knowledge by the *adjudicataire*, at the time he bid, that the adjoining property did not belong to the defendants, and was included in the description by error, would be a complete bar to such claim. —Q. B.—*Melançon & Hamilton*, 16 L. C. J., p. 57.

10. An action *quanto minoris*, does not lie, in the case of a purchase of a lot described as containing 100 acres, more or less, on the ground that a portion of the lot is traversed by a railway, which reduces the contents to the extent of the property of such railway, when the existence of such railway prior to the sale was known to the purchaser.—Q. B.—*Derby & Herrick*, 19 L. C. J, p. 24.

11. The remedy of a purchaser of real estate in case of deficiency of quantity in the land sold is not in damages, but to claim either a diminution of the price or the revocation of the sale.—DORION, J.—*Doutney vs Bruyère*, 21 L. C. J., p. 95.

12. But held in Appeal.—The value of a deficiency in quantity of land sold, is properly recoverable in the shape of damages, and that the diminution in price allowed, in such a case, by C. C. 1501, is only a mode of assessing such damages.—Q. B.—*Doutney & Bruyère*, 24 L. C. J., p. 17.

Digitized by Google

13. Depuis le Code de procédure l'adjudication d'un immeuble est toujours sans garantie de contenance, et l'adjudicataire ne peut, par opposition afin de conserver sur les deniers de la vente, réclamer la valeur d'un déficit dans cette contenance.—TASCHEREAU, J.—*Pelletier vs Chassé*, 3 Q. L. R., p. 65.

14. By law the adjudication of an immoveable at a sheriff's sale is without any warranty as to contents, and the *adjudicataire* purchases *per aversionem* and not *per mensuram*.—STUART, J.—*Douglas vs Douglas*, 3 Q. L. R., p. 197.

15. Le défaut de contenance dans un immeuble vendu par le syndic par décret sous l'acte de faillite donne droit à l'adjudicataire de demander la diminution du prix, dans les proportions d'achat et de déficit.—L'adjudicataire ayant par erreur quant à la contenance de la propriété, payé le montant entier de son adjudication, est bien fondé à demander la réduction du prix d'adjudication.—Pour que ces principes puissent être appliqués, il faut démontrer que l'adjudicataire a été trompé lorsqu'il a payé le plein montant et que le paiement qu'il a fait est un paiement fondé sur l'erreur.—Q. B.—*Thomas & Murphy*, 8 R. L.. p. 231.

16. Que l'acheteur d'un immeuble dont les limites n'ont jamais été définies par un bornage légal, ne pourra obtenir une diminution de prix de vente pour un prétendu déficit qu'il n'a pas fait constater par un bornage entre lui et ses voisins.—CHAGNON, J.—*Lalonde vs McManus*, 12 R. L., p 23.

1502. [In either of the cases stated in the last preceding article, if the deficiency or excess of quantity be so great, in comparison with the quantity specified, that it may be presumed the buyer would not have bought if he had known it, he may abandon the sale and recover from the seller the price, if paid, and the expenses of the contract, without prejudice in any case to his claim for damages.]—16 Duranton, n. 223 ; 3 Delvincourt, p. 138, note ; 1 Duvergier, n. 286 ; 4 Zachariæ, p. 289, nn. 29, 30 ; 6 Marcadé, p. 236 ; C. C., *Title of Obligations*, ch. 6 ; C. N., 1618, 1619, 1620 ; *Contrà*, Troplong, *Vente*, nn. 330, 331. [II. 47.]

1503. [The rules contained in the last two preceding articles do not apply, when it clearly appears from the description of the immoveable and the terms of the contract that the sale is of a certain determinate thing, without regard to its quantity by measurement, whether such quantity is mentioned or not.]—[II. 47.]

DECISIONS :—1. The hypothecation of a lot of land described by its medes and bounds is a hypothecation of a thing certain although the contents assigned be less than those contained in the said lot and in such case the hypothec covers the lot in its entirety.—Q. B.—*Labadie & Truteau*, 3 L. C. R., p. 155.

2. A sale of land by given boundaries, for a fixed sum, although a quantity is stated in the description, is a sale *en bloc* or *per aversionem*, and not by measurement.—The vendor by such a sale conveys all the property within the specified limits, and cannot reclaim any part of it, under pretence of there being a surplus,

Digitized by Google

unless it had been obtained from him by the fraud of the purchaser.—In such a case the law gives the surplus to the vendee, in this respect differing from the Code Napoleon which has established a new rule.—In a conflict of titles between two proprietors of different portions of a lot of land derived from a common *auteur*, the one who traces back his title to the common source, particularly when it appears or is to be presumed he was the first purchaser, will have the preference over the one who only shows a more recent deed; and in determining the contest, the question will be as if it had arisen between the original vendee and the original vendor, bound to make good the description by which he sold. For determining the extent of the thing sold specific boundaries are to be preferred to an indication of quantity.—Q. B.—*Herrick & Sixby*, 8 L. C. J., p. 324, 17 L. C. R., p. 146.

See also cases noted at C. C. 1501.

1504. The action for supplement of price on the part of the seller, or for diminution of price, or for vacating the contract, on the part of the buyer, is subject to the general rules of prescription.—C. N., 1622. [II. 47.]

1505. If two immoveable properties be sold by the same contract, at a single price for the whole, with a declaration of the contents of each, and in one the quantity be less than stated and in the other greater, the deficiency of the one is compensated by the excess of the other so far as it goes, and the action of the buyer or seller is modified accordingly.—*ff* L. 42, *De contr. empt.*; Pothier, *Vente*, 256; C. N, 1623. [II. 49.]

DECISION:—If five lots of land have been sold in one lot *en bloc* and for one price and the purchaser has only obtained possession of four of them, the said purchaser being sued for the balance of the purchase money is well founded in pleading that the lot not delivered to him is worth a larger sum than the rest of the lots and that therefore he is entitled to have the value of such lot deducted from the original price of the five lots.—Q. B.—*McVeigh & Lussier*, 7 L. C. J., p. 132, 13 L. C. R., p. 265.

SECTION III.—OF WARRANTY.

General Provisions.

1506. The warranty to which the seller is obliged in favor of the buyer is either legal or conventional. It has two objects:

1. Eviction of the whole or any part of the thing;

2. The latent defects of the thing.—*ff* L. 3, *De act. empt.*, L. 21, L. 38, *De ædilitio edicto*; Pothier, *Vente*, nn. 81, 82, 181, 202; C. L., 2450, 2451; C. N., 1625. [II. 49.]

Digitized by Google

1507. Legal warranty is implied by law in the contract of sale without stipulation. Nevertheless the parties may, by special agreement, add to the obligations of legal warranty, or diminish its effect, or exclude it altogether.—*ff* L. 21, *De ædilo. edict*; Pothier, *Vente*, n. 202, 210, 229, 230; Domat, liv. 1, tit 2, sect. 10, nn. 6, 7; C. N., 1627. [II. 49.]

Amendments: See amendments noted at C. C., 1522.

DECISIONS:—1. One who binds himself with a vendor *solidairement* to defend the purchaser against all claimants is necessarily a *garant formel*.—K. B.—*Peltier vs Puize*, 2 R. de L., p. 207.

2. Le shérif n'est pas garant envers l'adjudicataire qui n'a pu obtenir possession d'un bien à lui adjugé par le shérif en sa qualité de shérif. L'adjudicataire a son recours contre ceux qui ont reçu l'argent.—McCord, J.—*Lachance vs Sewell*, M. C. R., p. 95.

3. La garantie conventionnelle fait cesser la garantie légale.—Privy Council.—*Chaudière Gold Mining Co. vs Desbarats*, 4 R. L., p. 645. (Not reported in P. C. App. Cas.)

§ 1. *Of warranty against eviction.*

1508. The seller is obliged by law to warrant the buyer against eviction of the whole or any part of the thing sold, by reason of the act of the former, or of any right existing at the time of the sale, and against incumbrances not declared and not apparent at the time of the sale.—*ff* L. 1, *De evictione*; L. 11, §§ 8, 11, *De act. empt.*; Cod., L. 6. *De eviction*; Pothier, *Vente*, nn. 86, 200; Domat, *loc. cit.*, nn. 2, 3, 5; Guyot, Rép., vo. *Garantie*, 726; 6 Marcadé, p. 252, sec. 2; C. N., 1626. [II. 49.]

DECISIONS:—1. La garantie est divisible entre covendeurs qui vendent ensemble des parts indivisées, mais déterminées, qu'ils possèdent dans l'immeuble vendu, sans stipulation de solidarité.—C. R.—*Marteau vs Tétreau*, 1 L. C. J., p. 245.

2. The obligation of the *garant formel* is not extinguished by a *décret*, which does not purge the *charge*, even where the *acquéreur* becomes *adjudicataire* under the *décret*.—Q. B.—*Soulard & Letourneau*, 19 L. C. J., p. 40.

3. In the case of a donation of an immoveable, creating a substitution, followed by another donation of the same property, by the same donor to the same donee, without mention of any substitution, but without any express revocation of the former donation, the *adjudicataire* of such immoveable at sheriff's sale is justified in claiming to be relieved from the sale, on the ground of fear of trouble in his possession, and he is entitled to claim to be so relieved in an answer to a rule against him for *folle enchère*.—Q. B.—*Jobin & Shuter*, 21 L. C. J., p. 67.

4. The appellants bought from the respondent, the assignee to the estate of L. J. Campbell, the assets of the estate. The sale was according to inventory and comprised an item of Railway and Newspaper advertising stock $5,642.76. The price, which was payable ten days after the sale, was paid before, on an agreement by the respondent that he would account for any deficiency according to

Digitized by Google

the valuation placed by the appellants opposite each item on the inventory. The stock consisted of 150 shares of $100 each, par value, on which $5,642.76 had been paid, leaving a balance of $9,357.24 still due. The shares could not be transferred, unless the purchasers assumed this liability, which they refused to do—*Held:* That the appellants had the right to have the sale of stock annulled and to claim a sum of $2000, being the valuation they had placed on the stock when they purchased, and according to which the respondent had agreed to refund in case of deficiency.—Q. B.—*Dixon & Perkins*, 1 Q. B. R., p. 1, 3 L. N., p. 364.

5. In a division of common property between partners, M. one of the partners, agreed to take certain shares as his interest in a transaction, but in consequence of a claim by a third party, which was a partnership liability, these shares passed into other hands and could not be delivered to M. *Held*: That under the agreement between the partners, M. was entitled to have his portion made good out of the partnership assets, and the value of the shares not delivered to him should be calculated as at the time of the partition or agreement between the partners settling their respective rights.—PRIVY COUNCIL—*Macdougall & Prentice*, 8 L. N., p. 163, R. A. C., p. 1996.—Q. B.—7 L. N., p. 162, 4 Q. B. R., p. 91. (Not reported in App. Cas.)

6. The buyer of an immoveable property, when sued in an action *en bornage* containing at the same time petitory conclusions, has a right to proceed *en garantie* against the vendor.—C. R.—*Blackburn vs Blackburn*, 11 Q. L. R., p. 170.

7. Que le créancier qui fait vendre un meuble par autorité de justice connaissant qu'il y a un péril d'éviction provenant d'un douaire coutumier non ouvert aurait dû le dénoncer dans les annonces de la vente et ne l'ayant pas fait, il ne peut exiger de l'adjudicataire le prix de l'adjudication sans lui donner caution.—Q. B.—*Blondin & Lizotte*, 31 L. C. J., p. 80, M. L. R., 3 Q. B., p. 496.

8. Vente de créances portées aux livres d'un failli. Le syndic est-il obligé d'en garantir l'existence.—Q. B.—*Wade & Mooney*, 31 L. C. J., p. 222.

9. Que la guarantie d'éviction ne s'étend pas à la cession d'un droit incertain cédé à part de la chose principale, quoique dans le même acte, surtout lorsqu'il est stipulé sans garantie excepté des faits et promesses du vendeur.—Q. B.—*Demers & Ducharme*, 14 Q. L. R., p. 16. 16 R. L., p. 31. (This case has been carried to the Supreme Court.)

See also cases noted at C. C. 1535.

1509. Although it be stipulated that the seller is not obliged to any warranty, he is nevertheless obliged to a warranty against his personal acts. Any agreement to the contrary is null.—Pothier, *Vente*, 183-4; Domat, loc. cit., n. 8; C. N., 1628. [II. 49.]

DECISIONS:—1. Le vendeur d'une terre avec garantie de ses faits et promesses, est tenu de donner possession à l'acheteur avant de pouvoir recouvrer le prix de vente.—C. R.—*Foulds vs Laforce*, 5 R. L., p. 186.

2. It would appear that, by the law in force in Lower Canada, in the case of a sale without warranty, the vendor would be liable to the purchaser if he sold with a knowledge of the fact that he had no title.—PRIVY COUNCIL.—*Macfarlane & Leclaire*, 1 Moore's P. C. Rep. [N. S.] p. 1, 12 L. C. R., p. 374.

Digitized by Google

1510. In like manner, when there is a stipulation excluding warranty, the seller in case of eviction is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction or had bought at his own risk.—*ff* L. 11, § 18, *De action. empti.*; Pothier, *Vente*, 185-6; C. N., 1629. [II. 49.]

DECISIONS:—1. Un défendeur condamné à payer au demandeur le prix d'une quantité de cordes d'écorce de pruches qu'il avait vendues au demandeur et que ce dernier prétend ne pas lui avoir été livrées, ne pourra recouvrer du demandeur le montant qu'il aura été condamné à lui payer, s'il découvre après le jugement que ces cordes de pruche sont restées dans le bois et ont ensuite été vendues par le demandeur à son profit, s'il avait pu découvrir ce fait avant le jugement.—Q. B.—*Laincsse vs Labonté*, 8 R. L., p. 354.

2. Que le cédant sous la simple garantie de ses faits et promesses de tous les droits qu'il peut avoir en vertu d'un certain acte de convention indiqué, n'est pas tenu de rembourser à l'acquéreur le prix de la cession si ces droits ne peuvent être exercés par ce dernier.—Q. B.—*Demers & Ducharme*, 16 R. L., p. 31, 14 Q. L. R., p. 16. (This case has been carried to the Supreme Court).

1511. Whether the warranty be legal or conventional, the buyer, in case of eviction, has a right to claim from the seller:

1. Restitution of the price;

2. Restitution of the fruits in case he is obliged to pay them to the party who evicts him;

3. The expenses incurred, as well in his action of warranty against the seller as in the original action;

4. Damages, interest and all expenses of the contract;

Subject nevertheless to the provision contained in the article next following.—*ff* L. 60, L. 70, *De evict*; Pothier, *Vente*, 118, 123, 128, 130; Domat, *loc. cit.*, nn. 12, 13; C. N., 1630. [II. 49.]

DECISION:—Le droit à la restitution du prix de vente est indépendant de la garantie et n'a d'existence qu'entre les parties immédiates de la vente.—PRIVY COUNCIL:—*Chaudière Gold Mining Co. & Desbarats*, 4 R. L., p. 645. (Not reported in P. C. App. Cas.)

1512. If in the case of warranty the causes of eviction were known to the buyer at the time of the sale, and there be no special agreement, the buyer has a right to recover only the price of the thing sold.—Pothier, *Vente*, nn. 187-8-9, 190, and the authorities cited by him; 2 Delvincourt, p. 154. [II. 49.]

1513. The seller is obliged to make restitution of the whole price of the thing sold, although, at the time of eviction, it be found to be diminished in value, or deteriorated, either by the neglect of the buyer, or by a fortuitous event; unless the buyer has derived a

Digitized by Google

profit from the deterioration caused by him, in which case the seller may deduct from the price a sum equal to such profit.—*ff* L. 43, *De act empti* ; Dumoulin, *Tractatus de eo quod interest*, nn. 68, 69 ; Pothier, *Vente*, 69, 118; 1 Troplong, *Vente*, n. 488 ; C. N., 1631, 1632 ; *Contrà*, Domat, *loc. cit.*, n. 14. [II. 51.]

DECISION :—Neither party can rescind a contract, without replacing the other in the same position in respect to the goods as he occupied before the delivery of the article, nor without rescinding *in toto*.—TORRANCE, J.—*Lewis vs Jeffrey*, 18 L. C. J., p. 132.

1514. If the thing sold be found, at the time of eviction, to have increased in value, either by or without the act of the buyer, the seller is obliged to pay him such increased value over the price at which the sale was made. —*ff* L. 66, § 3, *De evict.* ; Cod., L. 9, L. 16 ; L. 45, *De evict.* ; Domat, *loc. cit.*, nn. 15, 16 ; Pothier, *Vente*, 71, 132 ; C. N., 1633. [II. 51.]

1515. The seller is obliged to indemnify the buyer, or to cause him to be indemnified, for all repairs and useful expenditures made by him upon the property sold, according to their value.—Pothier, *Vente*, 134; Troplong, *Vente*, 510 ; C. N., 1634; Domat, *loc. cit.*, nn. 17, 18. [II. 51]

DECISION :—Que lorsqu'un immeuble est vendu avec indication d'une contenance déterminée, sans laquelle l'acquéreur n'aurait pas acheté, ce dernier a le droit de demander la résiliation de la vente avec dommages intérêts contre le vendeur, en y comprenant la valeur de constructions par lui commencées sur cet immeuble, s'il constate, après la vente, qu'à la date d'icelle une rue passant sur une étendue considérable de ce terrain avait été tracée sur les plans de la Cité de Montréal, dûment homologués par la Cour, et qu'il est sujet à expropriation, sans indemnité, pour les constructions qu'il pourrait faire sur cet immeuble, et qu'il n'est pas tenu d'attendre l'expropriation pour procéder contre son vendeur.—MATHIEU, J.—*Mesnard vs Ramibeau*, 16 R. L., p. 97, M. L. R., 4 S. C., p. 25.

1516. If the seller have sold the property of another, in bad faith, he is obliged to reimburse the buyer for all expenditures laid out by him upon it.—*ff* L. 45, § 1, *in finè, De act. empti ;* Domat, *loc. cit.*, n. 19 ; Pothier, *Vente*, 137 ; C. N., 1635 ; C. C., 417. [II. 51.]

1517. If the buyer suffer eviction of a part only of the thing, or of two or more things sold as a whole, which part is nevertheless of such importance in relation to the whole that he would not have bought without it, he may vacate the sale.—*ff* L. 1, *De evict.* ; Pothier, *Vente*, 144 ; C. L., 2487 ; C. N., 1636. [II. 51.]

Digitized by Google

1518. If in the case of eviction of a part of the thing, or things sold as a whole, the sale be not vacated, the buyer has a right to claim from the seller the value of such part, to be estimated proportionally upon the whole price, and also damages to be estimated according the increased value of the thing at the time of eviction.—*ff* L. 13, *De evict.;* Dumoulin, *Tract. de eo quod interest,* nn. 67-8-9; Pothier, *Vente,* 142, 143; 1 Troplong, *Vente,* n. 517; 16 Duranton, n. 300; 3 Delvincourt, p. 149, note; C. N., 1637. [II. 51.]

DECISIONS :—In a deed of sale it was stipulated that the purchaser should have the right at any time to keep in his hands the whole or any part of the balance payable to the vendor, until such time as the vendor should have furnished a registered certificate showing the property sold to be "free and clear "of all mortgages, dowers or other encumbrances whatsoever." It appeared that part of a small island, which was included in the property sold, did not belong to the vendor, and there also existed a right of passage over the rest of this island. The island was of small value. *Held,* that the purchaser was not entitled under the above cited clause of the deed, to retain an instalment of the purchase money sued for, there remaining unpaid another instalment which was much more than sufficient to cover the proved value of the island and the right of passage.—Q. B.—*McDonnell & Goundry,* 1 L. N., p. 50.

2. Some fifty miles of timber limits were sold by Respondents, with guarantee against all troubles and the purchasers were subsequently evicted from part as they interfered with other limits granted by the crown. *Held*:—That in a sale of timber limits, held under licence, in pursuance of C. S. C. cap. 23, a clause of simple warranty (*garantie de tous troubles généralement quelconques*) does not operate to protect the purchaser against eviction by a person claiming to be entitled, under a prior licence, to a portion of the limits sold.—Privy Council.—*Ducondu & Dupuy,* 9 App. Cas. p. 150, 7 L. N., p. 46, R. A. C., p. 934.—Supreme Court.—6 S. C. R., p. 425, 5 L. N., p. 72.—Q. B.—3 L. N., p. 350.

1519. [If the property sold be charged with a servitude not apparent and not declared, of such importance that it may be presumed the buyer would not have bought, if he had been informed of it, he may vacate the sale or claim indemnity, at his option, and in either case may bring his action so soon as he is informed of the existence of the servitude.]—*ff* L. 1, § 2, *De ædil. edicto;* Pothier, *Vente,* 239; C. N., 1638. [II. 51.]

DECISIONS :—1. La stipulation, de la part d'un acquéreur, "de souffrir les "servitudes de toute nature qui pourraient exister sur la dite terre ou en sa "faveur, lesquelles tourneront au profit ou à la perte de l'acquéreur, sauf à lui de "se défendre de ce qui lui porterait préjudice et à profiter de ce qui lui serait "utile à ses risques et périls, sans aucun recours contre le vendeur, le dit ven- "deur déclarant néanmoins ne connaître aucune servitude de l'une ou de l'autre "espèce *qu'un droit de passage à pied ou en voiture* sur la dite terre en faveur de

Digitized by Google

" Pierre Monastesse, que le dit acquéreur sera obligé de souffrir comme susdit," n'empêche pas cet acquéreur de demander la rescision de la vente ou une diminution du prix de vente, si ce droit de passage est accompagné de la charge de l'entretien, à la connaissance du vendeur, mais non de l'acquéreur.—MONK, J.—*Christie vs Malhiot*, 10 L. C. J., 78.

2. Que dans la cité de Montréal, un vendeur d'un lot de terre sur lequel la cité de Montréal a un droit de servitude en vertu de sa charte, c'est-à-dire, le droit d'empêcher les propriétaires de construire en dehors de la ligne fixée par le plan homologué de la cité, dans les rues qui doivent être élargies ou ouvertes, est tenu de garantir l'acheteur contre cette servitude à moins de convention contraire et l'acheteur menacé d'éviction peut faire résilier la vente. Que dans ce cas l'acheteur a droit de se faire rembourser par le vendeur toutes les impenses et améliorations qu'il aura faites sur ce lot.—MATHIEU, J.—*Ménard vs Rambeau*, M. L. R., 4 S. C., p. 25, 16 R. L., p. 97.

1520. Warranty against eviction ceases in case the buyer fails to call in the seller within the delay prescribed in the Code of Civil Procedure, if the latter prove that there existed sufficient ground of of defence to the action of eviction.—Domat, liv. 1, tit. 2, sec. 10, nn. 21, 22 ; Pothier, *Vente*, nn. 108-9 ; C. N., 1640. [II. 53.]

DECISIONS :—1. Que si un garanti néglige de mettre en cause son garant, il doit payer tous les frais encourus, après le procédé qui exige cette mise en cause. Que le garant peut se charger des risques de la contestation et dispenser le garanti de prendre les procédés nécessaires pour le mettre en cause, mais que le fait seul qu'un garant a fourni au garanti les noms de témoins nécessaires pour prouver l'existence de la dette garantie, n'est pas une preuve suffisante que le garant a entendu se charger de la contestation.—Q. B.—*Carreau & McGinnis*, 1 Q. B. R., p. 12, 3 L. N., p. 362.

2. Que pour que la garantie pour cause d'éviction cesse lorsque l'acheteur n'appelle pas son vendeur en garantie, il faut que ce dernier prouve qu'il avait des moyens suffisants pour faire renvoyer la demande d'éviction dirigée contre l'acheteur.—CIMON, J.—*Drapeau vs Marion*, M. L. R., 2 S. C., p. 99.

1521. The buyer may enforce the obligation of warranty when without the intervention of a judgment, he abandons the thing sold or admits the incumbrance upon it, if he prove that such abandonment or admission is made by reason of a right which existed at the the time of sale.—Pothier, *Vente*, 94, 95. [II. 53.]

§ 2.—*Of warranty against latent defects.*

1522. The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have

Digitized by Google

given so large a price, if he had known them.—*ff* L. 1, § 1, *De ædil. edicto ;* Domat, liv. 1, tit. 2, sect. 11, nn, 1, 3 ; Pothier, *Vente*, nn. 202, 203, 232 ; Merlin, Rép, vo. *Garantie*, § 8, n. 2 ; C. N., 1641. [II. 53.]

Amendment :—20. Whenever any person sells or contracts to sell, whether by writing or not, to any other person, any chattel or article, with any trade mark thereon, or upon any cask, bottle, stopper, cork-capsule, vessel, case, cover, wrapper, band, reel, ticket, label or other thing together with wich such chattel or article is sold or contracted to be sold, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee, that every trade mark upon such chattel or article, or upon any such cask, bottle, stopper, vessel, case, cover wrapper, hand, reel, ticket, label or other thing as aforesaid, was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered to and accepted by the vendee.

21. Whenever any person sells or contracts to sell, whether by writing or not, to any other person, any chattel or article upon which, or upon any cask, bottle, stopper, cork, capsule, vessel, case, cover, wrapper, band, reel, ticket, label or other thing, together with which such chattel is sold, or contracted to be sold, there is any description, statement or other indication of or respecting the number, quality, quantity, measure or weight of such chattel or article, or the place or country in which such chattel or article has been made, manufactured, bottled or put up, or produced, the sale of contract to sell shall, in every case, be deemed to have been made with a warranty or contract by the vendor to or with the vendee, that no such description, statement, or other indication was in any material respect false or untrue, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered to and accepted by the vendee. —R. S. C., cap. 166, ss. 20, 21.

DECISIONS :—1. Where the parties had exchanged horses with warranty of soundness and the defendant, more than four months afterwards, discovered that the horse which he had received from the plaintiff was subject to *tic* or *rot*, a malady which could not be perceived at the time of the exchange, it was held that, in consequence of the delay which had transpired since the transaction, the defendant could not demand a rescission of the sale, but he could nevertheless set up against a demand by the plaintiff, a claim for the diminution of the price, according to the value established by proof.—Berthelot, J.—*Durocher vs Bons*, 8 L. C. J., p. 168.

2. In an action of damages, based on the allegation that the defendant knowing a horse to be unsound, falsely and fraudulently represented the animal

Digitized by Google

to be sound, and that the plaintiff purchased the horse from defendant, on the faith of the truth of such representation, it must be established beyond doubt that these facts are true, to entitle plaintiff to recover.—Q. B.—*Teasel & Pryor*, 12 L. C. J., p. 108.

3. An imperfect wooden drain, connecting the closet and sinks of a house with the common sewer in the street of a city, is a latent defect against which the seller is obliged by law to warrant the buyer, where, from the character of the house, the buyer had reason to believe that the drains were constructed in a proper manner.—Q. B.—*Ibbotson & Ouimet*, 21 L. C. J., p. 53.

4. A person who buys wheat for seeding purposes is not bound to pay the price thereof if the wheat does not germinate, even although the seller, at the time of the sale, was ignorant of the existence of any latent defects in the wheat sold.—Bélanger, J.—*Meloche vs Bruyère*, 5 R. L., p. 395.

5. Que le *râle*, l'*asthme* et le *souffle* ne constituent pas des défauts cachés.—Mackay, J.—*Crevier vs Chayer*, 3 L. N., p. 84.

6. Que le *rot* ou *tic* chez un cheval constitue un vice redhibitoire.—Q. B.—*Drolet & Laferrière*, 12 R. L., p. 359.

7. Que la maladie appelée "*tactisse*" constitue chez le cheval un vice redhibitoire.—Rainville, J.—*Gosselin vs Brisebois*, 12 R. L., p. 366.

8. Que la *boiterie intermittente* ne constitue pas un vice redhibitoire.—Olivier, J.—*Lenoir vs Mandeville*, 12 R. L., p. 369.

9. La vente du droit de se servir d'une invention comprend une garantie que l'invention est nouvelle et utile, et l'acquéreur de tel droit poursuivant en dommages n'est pas obligé de faire mettre de côté la patente avant de pouvoir recouvrer le prix qu'il a payé. L'usage d'une patente pour les fins de fabrication est une affaire commerciale.—Q. B.—*Déry & Hamel*, 11 Q. L. R., p. 24, 13 R. L., p. 50, 7 L. N., p. 405.

10. Que les vices ou défauts non apparents, mais pouvant être découverts par un examen minutieux, ne donnent pas lieu à l'action redhibitoire, bien que le vendeur n'ait pas déclaré à l'acheteur les vices de la chose vendue, qui étaient à sa connaissance et bien qu'il fut de mauvaise foi.—Loranger, J.—*Vincent vs Moore*, 8 L. N., p. 3.

11. Que l'on ne peut considérer comme un défaut caché dont le vendeur est tenu de garantir l'acheteur, la trop grande faiblesse des ressorts d'une voiture que l'acheteur a pu examiner en l'achetant. Que le vendeur n'est pas tenu des vices de la chose vendue et la vente n'en peut être annulée, lorsque l'acheteur les a connus depuis la vente, et qu'il a persisté à garder cette chose vendue, acceptant l'obligation du vendeur de la réparer.—Mathieu, J.—*Parquette vs Dépocas*, M. L. R., 3 S. C., p. 48.

12. That a statement in an advertisement of an auction sale, that a pair of horses were "warranted sound" did not constitute a warranty; especially when the conditions of sale expressly stated that "no warranty would be given." The horses in question were "sound," notwitstanding that one of them was bent over or "sprung" in the knees.—Doherty, J.—*Allan vs Burland*, M. L. R., 2 S. C., p. 1.

13. Que la boiterie intermittente dans un cheval vendu comme étalon reproducteur, avec garantie expresse de tous défauts par acte authentique, est un vice redhibitoire.—Q. B.—*Houle & Côté*, 13 Q. L. R., p. 80.

1523. The seller is not bound for defects which are apparent

Digitized by Google

and which the buyer might have known of himself.—*ff* L. 48, § 4, *De œdil. edicto*; Domat, *loc. cit.*, and nn. 10, 11; Pothier, *Vente*, nn. 207-9; C. N., 1642. [II. 53.]

DECISIONS:—1. The bad quality of goods purchased and delivered is not a *défense* to an action for the price, if the defendant, when they were purchased, had it in his power to examine them.—K. B.—*Marquis vs Poulin*, 1 R. de L., p. 347.

2. Il ne peut y avoir lieu à la rescision d'un contrat, pour cause de dol ou fraude, si les défauts dont se plaint la partie lésée étaient ouverts et faciles à constater, et si ces objections ne portent que sur des incidents ou accessoires, ou des éventualités probables, et non sur la substance même de la chose.—BEAUDRY, J.—*Frigon vs Bussel*, 5 R. L., p. 559.

3. Que celui qui achète une pile de bois de sciage déterminée et qui, avant de l'acheter, l'examine en partie et se déclare content et satisfait de la qualité, n'a pas, lorsqu'elle lui est délivrée, le droit de répudier son achat pour partie, en employant une partie du bois et remettant la plus mauvaise partie au vendeur. Que si le vice dont l'acheteur se plaint est apparent, il ne peut pour cela demander la résiliation de la vente.—MATHIEU, J.—*Dufresne vs Reilly*, 12 R. L., p. 433.

4. The Appellants bought a quantity of sherry from the Respondent, on sample, the sale and delivery of which took place in 1881. In 1883, the Appellant sought the nullity of the sale alleging that the wine was not equal to the sample but was unmerchantable in quality. It was held that the action was not brought with reasonable diligence.—Q. B.—*Guest & Douglas*, 30 L. C. J., p. 211.

See also cases noted at C. C. 1530.

1524. The seller is bound for latent defects even when they were not known to him, unless it is stipulated that he shall not be obliged to any warranty.—*ff* L. 1, § 2, *De œdil. edicto.* Domat, *loc. cit.*, n. 5, Pothier, *Vente*, n. 210; C. N., 1643. [11. 53.]

1525. When several principal things are sold together as a whole, so that the buyer would not have bought one of them without the other, the latent defect in one entitles him to vacate the sale for the whole.—*ff* L. 34, § 1, L. 35 L. 38, *De œdil. edicto*; Pothier, *Vente*, 227-8; Domat, *loc. cit.*, n. 16; C. L., 2518. [II. 53.]

1526. The buyer has the option of returning the thing and recovering the price of it, or of keeping the thing and recovering a part of the price according to an estimation of its value.—*ff* L. 21, L. 23, § 7, *loc. cit.*; Domat, *loc. cit.*, n. 2; Pothier, *Vente*, 202, 217, 232; C. N. 1644. [II. 53.]

1527. If the seller knew the defect of the thing, he is obliged not only to restore the price of if, but to pay all damages suffered by the buyer.

Digitized by Google

He is obliged in like manner in all cases in which he is legally presumed to know the defects.—*ff* L. 13, *De actio. empti*; Domat, *loc. cit.*, n. 7; Pothier, *Vente, loc. cit., Obl.*, 163; C. N., 1645. [II. 53.]

1528. If the seller did not know the defects, or is not legally presumed to have known them, he is obliged only to restore the price and to reimburse to the buyer the expenses caused by the sale.—*ff* L. 1, § 1, *De act. empti.*; Domat, *loc. cit.*, n. 6; Pothier, *loc. cit.*, C. N., 1646 [II. 53.]

1529. If the thing perish by reason of any latent defect which it had at the time of the sale, the loss falls upon the seller, who is obliged to restore the price of it to the buyer, and otherwise to indemnify him, as provided in the two last preceding articles.

If it perish by the fault of the buyer or by a fortuitous event, the value of the thing in the condition in which it was, at the time of the loss, must be deducted from his claim against the seller.—*ff* L. 31, § 11; L. 47, § 1, *De œdil edicto*; Pothier, *Vente*, 220-1; Domat, *loc. cit.*, n. 9; 3 Delvincourt. p. 152, n. 9; 16 Duranton, n. 326; 1 Duvergier, n. 414; 4 Zachariæ, p. 304, n. 11; 6 Marcadé, p. 285; 2 Troplong, *Vente*, n. 568, p. 30; C. N., 1647. [II. 55.]

1530. The redhibitory action resulting from the obligation of warranty against latent defects, must be brought with reasonable diligence, according to the nature of the defect and the usage of the place where the sale is made.—Pothier, *Vente*, 231; Domat, *loc. cit.*, n. 18; C. N., 1648. [II. 55.]

DECISIONS:—1. As soon as the purchaser ascertains that the merchandise delivered does not answer the order given, he must return them to the vendor or give him notice to take them back; and if he neither returns them, or give the vendor notice, he cannot afterwards rest his defence upon the ground that the goods were quite unfit for the purpose for which he intended to use them.—Q. B. —*Wurtele & Boswell*, 3 R. de L., p. 193.

2. No damages can be claimed by a vendee, who has neglected to tender back the article bought, so soon as he discovered the defects thereof.—C. R.—*Clément vs Pagé*, 1 L. C. J., p. 87.

3. When there is a sale by sample, and the goods do not agree with it, the vendor must make known the defect within reasonable delay; he could not claim to rescind the sale and return the goods after a delay of six months.—Smith, J.—*Joseph vs Morrow*, 4 L. C. J., p. 288.

4. Par suite des délais écoulés depuis l'échange de chevaux entre les parties, la garantie stipulée de la part du demandeur n'entraîne pas la résolution, mais donne lieu seulement à une diminution du prix.—Berthelot, J.—*Durocher vs Bone*, 8 L. C. J., p. 168.

Digitized by Google

5. No action *pour vice rédhibitoire* will be maintained unless brought within eight days after the sale of the horse.—BERTHELOT, J.—*Darte vs Kennedy*, 15 L. C. J., p. 280.

6. Although the redhibitory action must be brought with reasonable diligence, yet if the defendant does not complain of the delay occuring before the institution of the action by his pleadings, the Court cannot *suo motu* supply the omission.—BÉLANGER, J.—*Danis vs Taillefer*, 5 R. L., p. 404.

7. Promissory notes of a person, who was insolvent and who made an assignment five days later, were given in payment of goods sold. Three months later the vendors brought a redhibitory action. This was held not to have been brought with reasonable diligence, knowledge of the worthlessness of the notes having been brought home to the vendors with a few days from the date of the sale.—TORRANCE, J.—*Lewis vs Jeffrey*, 5 R. L., p. 462.

8. Where the parties resided within 20 miles of one another, a redhibitory action instituted six weeks after the sale will not be considered to have been brought "with reasonable diligence" and will be dismissed.—TESSIER, J.—*Bégin vs Dubois*, 1 Q. L. R., p. 381.

9. It is not competent for a party sued on a note given as boot on an exchange of horses to plead non-liability on the ground of a redhibitory vice in the horse received by him, and without bringing any action to set aside the exchange, especially when such plea is filed several months after the defendant knew of the vice and had tendered back the animal.—JOHNSON, J.—*Véronneau vs Poupart*, 21 L. C. J., p. 326.

10. Where the buyer of a horse pleaded redhibitory defects in answer to an action for the price, brought fourteen months after the delivery of the animal, it was held too late to raise that defense.—TORRANCE, J.—*Crévier vs Société d'Agriculture de Berthier*, 27 L. C. J., p. 357, 4 L. N., p. 373.

11. The redhibitory action may be brought by the purchaser of a horse even after eight or more days have elapsed from the time of its delivery, so long as reasonable diligence has been used.—Q. B.—*Lanthier & Champagne*, 23 L. C. J., p. 253.

12. Que la question de diligence raisonnable suivant "la nature du vice et "l'usage du lieu," est laissée à la discrétion du juge de première instance et sa décision ne doit pas être mise de côté à moins d'erreur évidente, en matière d'actions redhibitoires.—Q. B.—*Houle & Côté*, 13 Q. L. R., p. 80.

13. Qu'une action en résiliation de vente pour vice redhibitoire peut, suivant les circonstances, être maintenue quoiqu'elle ne soit intentée qu'un mois et huit jours après la vente.—ANGERS, J.—*Picard vs Morin*, 13 Q. L. R., p. 223, 15 R. L., p. 317.

14. Qu'une action pour restitution de partie du prix, intentée plus de trois semaines après la vente, sera maintenue suivant les circonstances de l'espèce. —Q. B.—*Taylor & Gendron*, 15 R. L., p. 294.

15. Qu'une action redhibitoire signifiée au défendeur 32 jours après la vente n'est pas intentée avec diligence raisonnable.—MATHIEU, J.—*Tiernan vs Trudeau*, 15 R. L., p. 444.

See also cases noted at C. C. 1523.

1531. In sales made under process of execution there is no

Digitized by Google

obligation of warranty against latent defects.—*ff* L. 1, § 3, *De ædil edicto*; Domat, *loc. cit.*, n. 17; C. N., 1649. [II. 55.]

CHAPTER FIFTH.

OF THE OBLIGATIONS OF THE BUYER.

1532. The principal obligation of the buyer is to pay the price of the thing sold.—Domat, liv. 1, tit. 2, sec. 3, n. 1; Pothier, *Vente*, 278; C. N., 1650. [II. 55.]

DECISIONS:—1. A bailiff has no action for the recovery of the price of goods seized and sold *en justice* against the purchaser to whom he has delivered these goods previously to his being paid.—TASCHEREAU, J.—*Pelletier vs Lajoie*, 5 L. C. R., p. 39. (See also cases cited there.)

2. Dans la vente, la valeur de l'objet vendu n'est qu'une qualité accidentelle du sujet de la vente.—Q. B.—*Rosenheim & Martin*, 6 R. L., p. 258.

3. It is not competent for the vendor of goods, bargained and sold for cash and not delivered in consequence of the non-payment of the purchase money, to sue for the price.—MONDELET, C. J.—*Gordon vs Henry*, 3 L. C. J., p. 166.

4. Que lorsqu'un vendeur s'oblige, par acte de vente à fournir à l'acquéreur à la date du paiement du prix d'achat et avant de pouvoir exiger ce paiement, tous les titres à la propriété vendue, il ne peut recouvrer aucune partie de ce prix de vente sans avoir fourni tous les titres.—Q. B.—*Petrin vs Brunet*, 12 R. L., p. 657.

5. Satisfaction of the clause of "*franc et quitte*," by the vendor of real estate, where the deed contains such a clause, is a condition precedent to bringing an action for the purchase money or for any portion thereof.—Q. B.—*Law & Frothingham*, 4 L. N., p. 67.

6. Where real estate is sold free and clear of incumbrances and it appears that the property is charged with a hypothec, the purchaser is not bound to take a deed until the vendor has caused the hypothec to be discharged.—Q. B.—*Burroughs & Wells*, M. L. R., 3 Q. B., p. 492, 15 R. L., p. 228.

See also cases noted at C. C. 1535.

1533. If the time and place of payment be not fixed by agreement, the buyer must pay at the time and place of the delivery of the thing.—*ff* L. 41, § 1, *De verb. oblig.*; L. 14, *De regulis juris*; Domat, *loc. cit.*, n. 2; Pothier, *Vente*. 279; C. N., 1651. [II. 55.]

DECISIONS:—See cases noted at C. C. 1532.

1534 The buyer is obliged to pay interest on the price in the cases following:

1. In case of a special agreement, from the time fixed by such agreement;

Digitized by Google

2. In case the thing sold be of a nature to produce fruits or other revenues, from the time of entering into possession of it. But if a term be stipulated for the payment of the price, the interest is due only from the expiration of such term ;

3. In case the thing be not of a nature to produce fruits or revenues, from the time of the buyer being put in default.—*ff* L. 13, §§ 20, 21, *De act empti ;* Pothier, *Vente*, 283-4-5-6 ; Domat, *loc. cit.*, n. 6 ; C. C., 1067, 1070, 1077 ; C. N., 1652. [II. 55.]

DECISIONS :—1. A purchaser enjoying the property purchased and the rents, issues and profits thereof and withholding the purchase money until his vendor shall have complied with a judgment condemning him to remove certain oppositions fyled against a petition for ratification of title, is bound to pay his vendor the interest of the purchase money as it becomes due, even although the latter may have failed to remove the oppositions in compliance with the judgment against him.—Q. B.—*Denning & Douglass*, 9 L. C. R., p. 310.

2. Un prix de vente stipulé payable par *instalment*, à de certains termes d'échéance *sans intérêt*, n'en portera pas moins intérêt de *plein droit*, *ex naturâ rei*, à compter de l'échéance de chaque *instalment*, si l'*instalment* n'est pas alors payé.—CHAGNON, J.—*Arpin vs Lamoureux*, 7 R. L., p. 196.

3. That a Railway Company which takes possession of land during the proceeding in expropriation, owes the proprietor thereof interest on the price allowed by the arbitrators from the moment that he was dispossessed of the land. MATHIEU, J.—*Atlantic & North Western Railway Co. vs Prudhomme*, M. L. R., 2 S. C., p. 21.

4. Que la stipulation que le prix d'une chose, de nature à produire des fruits ou autres revenus, sera payé à terme, sans intérêt, doit entendre sans intérêt jusqu'aux termes, et n'ajoute rien à la règle que fait l'article 1534 C. C.—C. R.—*Dumont vs Sevigny*, 12 Q. L. R., p. 76.

5. Where a person occupied property under a promise of sale for several years, and when the seller sought to eject him as a trespasser, the occupier only tendered with his plea to the action the exact sum for which he contended, and it was proved, the promise of sale was made, it was held that he should have also tendered interest.—Q. B.—*Nault & Price*, 4 Q. B. R., p. 357.—Confirmed in PRIVY COUNCIL :—13 Q. L. R., p. 287, 12 App. Cas. p. 110.

1535. If the buyer be disturbed in his possession or have just cause to fear that he will be disturbed by any action, hypothecary or in revendication, he may delay the payment of the price until the seller causes such disturbance to cease or gives security, unless there is a stipulation to the contrary. — C. S. L. C., ch. 36, sec. 31 ; C. C., Vaud, 1185 ; C. L., 2535 ; C. N., 1653. [II. 55.]

DECISIONS :—1. An action cannot be maintained by a vendor against a vendee to recover an instalment due on a *prix de vente*, the deed of sale containing a stipulation that the vendor should furnish to the purchaser, before payment of the instalment, a certificate from the registrar of the County within which the land is situated that there are no encumbrances or mortgages on the

Digitized by Google

land, and that, there being no proof that such certificate was furnished, notwithstanding proof adduced with the Plaintiff's answer to the plea of a notarial receipt not registered, dated previous to the sale, discharging the mortgage or *bailleur de fonds* claim alleged by the Defendants pleas to exist on the land in question.—C. R.—*Bunker vs Carter*, 5 L. C. R., p. 291.

2. A temporary exception *péremptoire en droit*, to an action for the recovery of a price of sale setting forth the existence of a mortgage on the property sold and the fyling of an opposition to letters of confirmation, is a good plea.—C. R.—*O'Sullivan vs Murphy*, 7 L. C. R., p. 424.

3. A purchaser enjoying the property and the rents, issues and profits thereof and withholding the purchase money until his vendor shall have complied with a judgment condemning him to remove certain oppositions fyled against a petition for ratification of title, is bound to pay his vendor the interest of the purchase money as it becomes due, even although the latter may have failed to remove the oppositions in compliance with the judgment against him.—Q. B.—*Denning & Douglass*, 9 L. C. R., p. 310.

4. The purchaser of immoveable property, who has accepted an assigment of the price of sale, cannot set up, in answer to the claim of the assignor, a demand *en délaissement* made against him, so long as he has not been judicially dispossessed.—Q. B.—*Lacombe & Fletcher*, 11 L. C. R. p. 38.

5. Upon motion, a Plaintiff will be allowed to substitute and fyle in a case a notarial *acte* of *cautionnement* with a new surety in place of one produced with the action, the first surety being alleged to have desisted from his *cautionnement*. MONK, J.—*Mongeau vs Dubuc*, 12 L. C. R., p. 94.

6. But it was held, in Appeal, that the purchaser of an immoveable, half of which was possessed by the vendor simply *à titre d'usufruit*, may refuse to pay the price of sale, if he be threatened with eviction, and this without being obliged to accept the sureties offered by the vendor.—Q. B.—*Mongeau & Dubuc*, 14 L. C. R., p. 344.

7. Celui qui vend avec la *clause de franc et quitte*, obtiendra jugement avec dépens contre l'acheteur qui aura plaidé et prouvé l'existence d'une hypothèque, pourvu qu'en déduisant du prix de vente le paiement réclamé par l'action, il reste une somme suffisante, entre les mains de l'acheteur, pour le garantir.—BADGLEY, J.—*Paquette vs Milette*, 4 L. C. J., p. 310.

8. Lorsqu'il existe des hypothèques sur un bien vendu, il sera sursis à l'exécution du jugement, jusqu'à ce que le vendeur donne caution.—BERTHELOT, J.—*Perras vs Beaudin*, 6 L. C. J., p. 241.

9. When the purchaser is in danger of being troubled, by reason of mortgages, in the possession of a property sold *franc et quitte*, he may retain the payment of the purchase money until such mortgages are removed by the vendor or unless security be given by the latter, according to the provisions of chapter 36 of the Consolidated Statutes of Lower Canada.—SMITH, J.—*Bruneau vs Robert*, 6 L. C. J., p. 247.

10. Lorsqu'il existe des hypothèques et charges sur un bien vendu, il sera sursis à l'exécution du jugement, jusqu'à ce que le vendeur donne caution *sous hypothèque de biens immeubles* que l'acheteur ne sera jamais troublé ni inquiété. Le vendeur n'ayant pas offert telle caution dans le cours de l'instance, doit payer les frais de l'action.—MONK, J.—*Bernesse vs Madon*, 7 L. C. J., p. 32.

11. L'acquéreur de biens immeubles par contrat antérieur au statut 23 Vic-

Digitized by Google

toria, chap. 59, peut, s'il est troublé ou a de fortes raisons de craindre d'être troublé, par action hypothécaire ou en revendication, retarder le paiement du prix d'achat, jusqu'à ce que le vendeur ait fait cesser ce trouble, tout comme s'il était acquéreur en vertu d'un contrat postérieur à cette loi.—SICOTTE, J.—*Merrill vs Halary*, 8 L. C. J., p. 38.

12. L'acquéreur de biens immeubles qui a de fortes raisons de craindre qu'il sera troublé par quelqu'action hypothécaire ou en revendication, a droit de retenir les intérêts de son prix de vente, de même que le capital—C. R.—*Dorion vs Hyde*, 10 L. C. J., p. 327.

13. The purchaser of a lot of land upon being sued for the balance of the *prix de vente* alleged and proved that the land was originally granted by letters patent to A. B. and others and was afterwards sold to the Plaintiff without any warranty, except as to his own acts and deeds, by a person who failed to show any connection of title between himself and the patentees or any person claiming through them. It was held that a purchaser so sued was not entitled to obtain from the Plaintiff the security provided by the Act 23 Vict. cap. 59 s. 18.—MCCORD, J.—*Hase vs Messier*, 14 L. C. R., p. 320.

14. In an action by a *bailleur de fonds* against a purchaser to recover $1216.66, the price of an immoveable propety, the plaintiff set up in his declaration that two mortgages amounting to $766.66 existed, affecting the property sold, and offered to furnish good and sufficient sureties, with *hypothèque*, that the defendant would not be troubled by reason of these mortgages. The Defendant pleaded by exception the existence of the same mortgage and his right, under the 31st section of the Consolidated Statutes of Lower Canada, chapter 36, to retain in his hands the capital sum and interest and praying that unless security were given by the plaintiff, within a delay to be fixed, his action be dismissed, with costs, and the Defendant declared to be entitled to retain the sums sued for. The Plaintiff, with his answer to the plea, produced discharges, duly registered, of the two mortgages. *Held:*—In the Superior Court, that the Plaintiff was entitled to judgment for the amount due, with costs of the action and contestation against the Defendant, and this judgment was conformed by the Court of Review.—C. R. *Tétreau vs Bouvier*, 15 L. C. R., p. 76.

15. That where in an action for a balance of the *prix de vente* of an immoveable under a deed of sale from the Plaintiff to the Defendant, passed in 1851, the Defendant set up under the 36th section of chapter 36 of the Consolidated Statutes of Lower Canada as a *trouble* that there were arrears of *cens et rentes* for nineteen years, since the date of a deed from the mother of the Plaintiff to the Defendant, dated in 1842, the Court will presume that the Defendant was in possession of the lot, from the date of the deed of 1842, invoked by him, down to the date of the second deed—That as such possessor and *détenteur* the *cens et rentes* are due by him and security will not be ordered to secure him against such *cens et rentes*. That the Plaintff is entitled in such case to his costs against the Defendant notwithstanding that by the judgment he is ordered to give security against an alleged claim of title in the previous vendor and without tender of such security before or by his action.—C. R.—*Thompson vs Thompson*, 15 L. C. R., p. 80.

16. In an action for a *prix de vente*, when the Defendant sets up trouble by mortgages registered against the immoveable, some of which were discharged after the filing of the plea, the Plaintiff will obtain judgment for the amount due, with costs up to the filing of the plea and that costs after the filing of the plea

Digitized by Google

will be granted to the defendant.—BADGLEY, J.—*Collette vs Dansereau*, 15 L. C. R., p. 83.

17. A purchaser of real estate who becomes party to a *transport* of a portion of the *prix de vente* and declares that he is content and satisfied therewith and holds it duly signified, obliging himself towards the *cessionnaire* for the payment of the sum transferred, in the manner set forth in his deed of purchase from the *cédant*, has neverthless the right to obtain security, when sued by the *cessionnaire*, against a *hypothèque* existing on the land prior to the sale made to him.—Such security will be ordered for the whole amount of such *hypothèque* although such amount greatly exceeds the sum sought to be recovered by the action.—The Defendant, in the case submitted, will be condemned to pay costs up to the date of his tender, which was made two days after action brought, and the Plaintiff condemned to pay costs subsequent to that date.—Q. B.—*Quentin & Butterfield*, 15 L. C. R., p. 488.

18. To an action brought to enforce a sale by an auctioneer of certain real estate, according to a memorandum of purchase signed by the Defendant, and praying that the Defendant be condemned to take a title and to pay the instalment to become due at the passing of the deed and to create a mortgage and to insure the property as security for the balance of the *prix de vente*, within a time to be fixed by the court, and in default thereof that the judgment should avail as a title under the condition or memorandum, the Defendant pleaded that he had just cause to fear being troubled by a substitution created by the will of the Plaintiff's father in favor of the children of the Plaintiff and that the sheriff's title invoked by the Plaintiff and obtained on a *délaissement* made by them in a cause brought by their mother, widow of the testator, was not valid but was obtained by concert to get rid of the substitution.—It was held that the Defendant had just cause to fear that he would be troubled by reason of the matters set up in the plea and that, inasmuch as the Plaintiff demanded an immediate condemnation for the instalment payable at the passing of the deed and had not offered security nor the Defendant demanded such security, the Court had no power to order it to be given and that therefore, inasmuch as the Defendant was not liable to be condemned to pay without security, the action must be dismissed with costs.—MONK, J.—*McIntosh vs Bell*, 16 L. C. R., p. 348.

19. Where the defendant pleads *trouble* to an action for instalments of purchase money, and offers to pay on security being given, the plaintiff should be condemned to pay the costs of the contestation.—BADGLEY, J.—*McDonald vs Molleur*, 1 L. C. L. J., p. 108.

20. Quand l'acheteur, poursuivi pour le prix de vente, allègue et prouve qu'il a de justes raisons de craindre d'être troublé, à raison d'un droit de pâturage et de rente annuelle hypothéqué en faveur d'un tiers sur l'immeuble vendu, le demandeur *est mal fondé* à prétendre qu'en laissant entre ses mains une portion du prix représentant le montant de l'hypothèque dont l'immeuble est grevé, pour garantie de la prestation de tel droit de pâturage et paiement de telle rente, il a fourni au défendeur l'équivalent du cautionnement requis par la loi.—Le vendeur ne peut s'exempter de rapporter purge des hypothèques dont l'acheteur se plaint, ou de donner caution, et il ne peut laisser ès mains de ce dernier, le montant de telles hypothèques que quand elles sont pour des sommes fixes, précises, déterminées et payables absolument et en argent.—Il ne suffit pas pour l'acheteur de dénoncer purement et simplement, préalablement à l'action, au

Digitized by Google

vendeur les causes de troubles, pour être envoyé indemne des frais; il faut de plus lui offrir réellement la portion du prix exigible.—Dans l'espèce, le défendeur n'ayant point fait d'offres réelles avant l'action, mais s'étant contenté de dénoncer les causes de trouble, tant avant l'action que par ses défenses, doit être condamné aux frais jusqu'à l'enfilure du plaidoyer.—Le défendeur ayant contesté le droit réclamé par le demandeur au cautionnement ou à la purge, doit être condamné aux frais de contestation.—Mais dans la même cause la Cour de Révision a jugé comme suit: L'acquéreur d'un immeuble hypothéqué jusqu'à concurrence de $50, en faveur de tiers "pour aider ces derniers à se faire payer d'une rente "viagère de $6 par an et d'un droit de pâturage," sans stipulation à l'acte constitutif de telle annuité, que tel droit de pâturage devra s'exercer sur tel immeuble, est mal fondé à demander caution ou purge, si le demandeur (son vendeur) a offert de lui laisser entre les mains la dite somme de $50, par l'action même.—Le défendeur, en tel cas, peut se libérer et purger son héritage, envers les tiers créanciers de la rente et du droit de pâturage en leur payant, une fois pour toutes, la dite somme de $50, montant de leur garantie hypothécaire.—C. R.—*Chabotte vs Charby*, 3 R. L., p. 392.—Sicotte, J.—2 R. L., p. 698.

21. L'acquéreur d'un immeuble qui a joui pendant dix ans à titre de propriétaire d'un immeuble grevé d'hypothèques par son vendeur, ne peut refuser le paiement d'aucune partie du prix de vente pour cause de crainte de trouble résultant de l'existence de ces hypothèques, la prescription les ayant éteintes quant à lui.—Mackay, J.—*Adams vs McCready*, 1 R. C., p. 243.—C. R., 3 R. L., p. 448.

22. Un défendeur ne peut, sous l'article 1535 C. C., exiger une garantie égale à la valeur de la propriété; mais lorsqu'il a payé partie du principal du prix de vente, il peut retenir la balance et les intérêts sur icelle pouvant égaler ce qu'il a en partie payé, à moins que le demandeur ne donne caution pour le prix entier de la vente, mais sans intérêt sur icelui.—Meredith, C. J.—*Farrell vs Cassin*, 3 R. L., p. 32.

22. L'acquéreur poursuivi pour le paiement du prix de vente, et qui prétend être troublé, ne peut invoquer le bénéfice de l'article 1535 du Code civil, que par une exception dilatoire. et il ne peut le faire par une exception péremptoire en droit temporaire. L'acquéreur d'un immeuble qui a été troublé par une action pétitoire intentée contre lui, plus de dix ans avant la poursuite pour le paiement du prix de vente, et qui n'a pas dénoncé ce trouble à son vendeur, mais a plaidé à l'action pétitoire, n'est pas pour cela privé du droit de plaider trouble, et de demander avant de payer que ce trouble cesse ou caution, et ce droit n'est pas éteint par la prescription.—Routhier, J.—*Wainwright vs Ville de de Sorel*, 5 R. L., p. 668.

23. La Cour peut d'office suppléer aux conclusions prises par le tiers poursuivi pour son prix de vente; et la Cour ne pouvant rescinder l'acte d'acquisition de ce tiers pour les raisons mentionnées dans sa défense, ordonnera pour ces mêmes raisons que jugement aille contre l'acheteur suivant que demandé, mais qu'il soit sursis à l'exécution du jugement, jusqu'à ce que le demandeur lui ait fourni cautionnement suivant la loi, à l'effet de le garantir contre tous troubles qu'il pourrait souffrir plus tard relativement à la revendication de ce propre par la femme.—Chagnon, J.—*Molleur vs Déjadon*, 6 R. L., p. 105.

24. Le trouble ou la crainte de trouble mentionnés dans l'article 1535 du Code Civil, doivent être plaidés par une exception péremptoire en droit tempo-

Digitized by Google

raire, et non par une exception dilatoire.—Lorsque le defendeur a plaidé crainte de trouble, le demandeur peut produire avec ses réponses les quittances des hypothèques mentionnées dans les exceptions du défendeur.—Si, lors de l'institution de l'action, l'immeuble dont le demandeur réclame le prix est hypothéqué à des tiers, mais que ces hypothèques soient radiées avant la production des défenses du défendeur, qui, avant la production de ces défenses, avait eu connaissance de la dite radiation, le défendeur, pour se libérer des frais de la demande, doit, avant l'institution de l'action du demandeur, le notifier de son intention de se prévaloir de l'article 1535 du Code Civil, à raison des dites hypothèques, et faire offres réelles.—Le demandeur a le droit de plaider et produire, en réponse à l'exception du défendeur alléguant trouble, des documents établissant la radiation et extinction (même postérieure à la date de l'institution de l'action) des hypothèques dont se plaint le défendeur, et le demandeur n'est nullement obligé en ce cas de se désister de sa demande en tout ou en partie.—Bélanger, J.—*Mathieu vs Vigneau*, 6 R. L., p. 514.

25. Un vendeur qui poursuit pour le recouvrement du prix de vente d'un immeuble grevé d'hypothèques, obtiendra jugement pour le montant du prix, mais sera condamné à donner caution.—Loranger, J.—*Deguire vs Bourgeois*, 6 R. L., p. 718.

26. Un adjudicataire peut se refuser de payer le prix de son adjudication et en demander la nullité, s'il prouve qu'il est exposé à un trouble imminent, et il n'est pas tenu de prouver qu'il est exposé à une éviction certaine, et la cour, si elle est d'opinion que l'adjudicataire a juste sujet de craindre d'être troublé, déclarera l'adjudication nulle, sans se prononcer sur la validité de la crainte de trouble.—Q.B.—*Jobin & Shuter*, 7 R. L., p. 705.

27. When a party is sued for the price of land, which is burdened with hypothecs beyond the price claimed, and the party sued has demanded before action that such hypothecs should be discharged, or good and sufficient security given against all possible trouble arising from such hypothecs, and the plaintiff has failed to cause the hypothecs to be discharged or the required security to be given, his action ought to be dismissed purely and simply.—Mere personal security in such a case is insufficient.—That although in such an action, the Defendant, by her plea, only prays for the dismissal of the action, in case the necessary security be not given within a delay to be fixed by the judgment and although the judgment in the Court of original jurisdiction be rendered according to the conclusions of such plea and such judgment be confirmed in Review, the Court of Appeal, on an appeal instituted by the Plaintiff only and without any cross-appeal by the Defendant, and although the Respondent pray, in her answer to the reasons of appeal and in her *factum*, for the confirmation of both judgments, will neverthless reform these judgments and dismiss the original action purely and simply.—Q. B.—*Dorion & Hyde*, 12 L. C. J., p. 49.

28. Il suffit à l'acheteur poursuivi pour paiement du prix de vente et des intérêts sur icelui, d'avoir dénoncé les hypothèques dont la propriété vendue est chargée sans faire d'offres réelles pour se garantir des frais d'action.—L'acheteur d'une propriété vendue avec la clause de franc et quitte, mais grevée d'hypothèque, peut retenir les intérêts stipulés au contrat de vente, tout en jouissant des fruits et revenus de la propriété vendue, si partie du prix de vente a été payée par l'acheteur, et ce indéfiniment, jusqu'à ce que le vendeur donne caution

Digitized by Google

ou fasse disparaître les hypothèques qui grèvent la propriété.—Q. B.—*Dorion & Hyde*, 12 L. C. J., p. 80.

29. In the case of a donation of an immoveable, creating a substitution, followed by another donation of the same property, by the same donor to the same donee, without mention of any substitution, but without any express revocation of the former donation, the *adjudicataire* of such immoveable at sheriff's sale is justified in claiming to be relieved from the sale on the ground of fear of trouble in his possession, and he is entitled to claim to be so relieved in an answer to a rule against him for *folle enchère*.—Q. B.—*Jobin & Shuter*, 21 L. C. J., p. 67

30. L'acquéreur qui a payé son prix de vente ou une partie d'icelui n'a pas le droit de demander à être remboursé de ce qu'il a payé ou à avoir un cautionnement, sous prétexte qu'il est exposé à être troublé. — L'acquéreur peut encore moins, dans un semblable cas, retenir les intérêts dus sur le capital ou sur la balance du prix de vente, tout en jouissant des fruits et revenus de la propriété vendue.—DORION, J.—*Hogan vs Bernier*, 21 L. C. J., p. 101.

31. The production of a registrar's certificate, showing that mortgages are registered against the property purchased, which mortgages do not appear to have been discharged, is sufficient to support a plea of fear of *trouble*, under art. 1535 C. C.—In such case the balance of purchase money which the buyer has yet to pay on the property is the only amount for which he can claim security.—Q. B.—*Parker & Felton*, 21 L. C. J., p. 253.

32. Notwithstanding a clause in a deed of sale of land, that the purchaser might at any time keep the whole or any part of the purchase money in his hands until the vendor should furnish him with a registrar's certificate showing the property to be free and clear of all mortgages and incumbrances whatsoever, the purchaser, in an action for the recovery of a portion of the purchase money, will be condemned to pay in the absence of such a certificate, when it is shown that he has in his hands a sufficient balance of the purchase money to meet any possible disturbance or trouble in his possession of the land sold.—Q. B.—*McDonell & Goundry*, 22 L. C. J., p. 221.

33. The purchaser of a property with warranty against "every description "of trouble or eviction which may arise from whatsoever source," but whose title does not contain the clause "free from all debts and hypothecs," cannot demand a resiliation of the sale in default of a removal of certain hypothecs which may afterwards appear to be a charge upon the property.—The difference between the ordinary covenant of warranty and the clause *franc et quitte*, considered.—C. R.—*Talbot vs Béliveau*, 4 Q. L. R., p. 104.

34. The representatives of the late John Frothingham sold to the Appellant a lot of land free and clear of all incumbrances, except a vendor's privilege in favour of the heirs McKenzie, which the vendors undertook to pay and to have a discharge of duly registered. HELD:—That the stipulation was in effect a stipulation of *franc et quitte*, and that the Appellant was not bound to pay any portion of the balance due on the purchase money, nor of the interest accrued, until the encumbrance was removed, and that this was properly pleaded by an *exception temporaire*.—Q. B.—*Law & Frothingham*, 1 Q. B R., p. 252, 4 L. N., p. 67.

35. Que lorsqu'un vendeur s'oblige, par acte de vente, à fournir à l'acquéreur à la date du paiement du prix d'achat et avant de pouvoir exiger ce paiement, tous les titres à la propriété vendue, il ne peut recevoir aucune partie de ce prix de vente sans avoir fourni tous les titres.—Q. B.—*Petrin & Brunet*, 12 R. L., p. 657.

Digitized by Google

36. Que l'acheteur qui, sur une vente par le shérif, a payé son prix de vente, ne peut forcer le créancier poursuivant le décret, qui a reçu le prix de vente, à le rembourser sous le prétexte qu'il est exposé à être troublé, et qu'il ne peut exercer de recours contre tel créancier que s'il est troublé dans sa possession.—Q. B. —*Trust & Loan Co. & Quintal*, 2 Q. B. R., p. 190.

37. When the purchaser of an immoveable stipulated that he would pay part of the purchase money to a third party and such third party sues him for it, it is a good defence to plead that he has good reason to fear trouble in his possession of the property by reason of a hypothecary claim against it, if he tender an amount equal to the interest during the time of his enjoyment of the property. —TORRANCE, J.—*Rhéaume vs Bouchard*, 4 L. N., p. 55.

38. The purchaser of real estate who is neither evicted nor disturbed in his possession, has no right to obtain the resiliation of the sale by reason of certain undischarged hypothecs registered against the property, although far exceeding the whole amount of the capital of the purchase, and which were not declared to him in the deed, unless the vendor sold to him with a stipulation of *franc et quitte*. —Q. B.—*Grand Trunk Ry. Co. & Brewster*, 6 L. N., p. 34.

39. On a sale of timber limits held under license pursuant to C. S. C., cap. 23, a clause of simple warranty (*garantie de tous troubles généralement quelconques*), does not operate to protect the purchaser against eviction by a person claiming to be entitled under a prior license to a portion of the limits sold.—PRIVY COUNCIL.—*Ducondu & Dupuy*, 9 App. Cas., p. 150, 7 L. N., p. 46, R. A. C., p. 934.—SUPREME COURT.—6 S. C. R., p. 425, 5 L. N., p. 72.—Q. B.—3 L. N., p. 350.

40. Que l'acquéreur qui a payé comptant et qui découvre ensuite qu'il existe au bureau d'enrégistrement une hypothèque consentie par son vendeur et enrégistrée avant la date de son acquisition ne peut pas, avant d'être troublé, poursuivre son vendeur pour qu'il la fasse rayer.—CASAULT, J.—*Drolet vs Belleau*, 11 Q. L. R., p. 190.

41. That in a suit by a vendor of real property for the recovery of the interest merely on the purchase money, it is not competent for the defendant to claim the right to retain such interest until security be given that he will not be disturbed in the possession of his property, by reason of certain undischarged hypothecs registered against it, exceeding in amount the whole capital of the purchase money.—JOHNSON, J.—*Grand Trunk Ry. Co. vs Currie*, 25 L. C. J., p. 22, 4 L. N., p. 45.

42. Where a purchaser of an immoveable has reason to fear eviction in respect of a claim exceeding in amount the balance due by him to the vendor, in capital and interest, and he offers, before suit by the vendor, to pay him such balance, provided he give the purchaser security against the apprehended eviction, and after suit deposits such balance with his plea, the action of the vendor should not be dismissed, purely and simply, but he should be ordered to furnish the security asked, within a delay to be fixed by the Court, and in default thereof his action be dismissed and the vendor should, under the circumstances, pay all costs.—C. R.—*Cannor vs Stewart*, 27 L. C. J., p. 358.

43. Under a plea of fear of eviction, the question to be decided is not as to the validity of the mortgage registered, but as to whether it gives the Defendant just cause to fear that he may be disturbed. A plea urging such a ground of defence and praying that the Plaintiff's action be declared premature and be dismissed, unless, within a time to be fixed by the Court, the Plaintiff either cause the mortgage to be discharged or give the Defendant security to keep him harm-

Digitized by Google

less from such mortgage was also held to be a good plea. (But, *note*, the Court may modify the conclusions so taken 21 L. C. J. p. 225.)—C. R.—*Noel vs Gagnon*, 5 Q. L. R., p. 218.

44. Que l'acquéreur d'un immeuble, poursuivi pour recouvrement d'arrérages d'intérêts sur le prix de l'immeuble, ne peut légalement mettre en question les titres du vendeur, ni même différer le paiement d'aucune partie du prix de vente, sans démontrer qu'il est troublé ou qu'il a un juste sujet de craindre d être troublé, par une action en revendication de la part du véritable propriétaire.—C. R.—*Birch vs Desjardins*, 11 R. L., p. 468.

45. A husband, after the death of his wife, sold a property which belonged to the community and of which his wife had, by will, given him the usufruct of her share. The purchaser was notified by those to whom the wife's half of the property had been bequeathed, of their claims, and theupon sought and succeded in annulling the sale.—Q. B.—*Mongeau & Dubuc*, 30 L. C. J., p. 25.

46. Qu'une inscription hypothécaire constitue un trouble du droit qui permet au débiteur, acquéreur du dit immeuble, de repousser l'action du vendeur, quoiqu'il apparaisse *prima facie* que la dite obligation est éteinte par la prescription trentenaire (see C. C. 21 50).—C. C.—*Maisonneuve vs Campeau*, 30 L. C. J., p. 277.

47. Que la cour inférieure ayant condamné le vendeur à donner caution en vertu de l'article 1535 C. C., sans limiter la durée de tel cautionnement, la cour d'appel réformera le jugement tout en reconnaissant que la question de savoir si l'acheteur a juste sujet de craindre d'être troublé est une matière discrétionnaire laissée à l'appréciation du tribunal de première instance.—Q. B.—*Biron & Trahan*, 29 L. C. J., p. 183, M. L. R., 1 Q. B., p. 247.

48. Que les dispositions de l'article 1535 C. C. sont applicables aussi bien à l'adjudicataire qu'à l'acheteur à vente privée.—Que la simple connaissance, par l'acquéreur ou l'adjudicataire, du fait qui pourrait occasionner le trouble, ne suffit pas pour l'obliger au paiement de son prix, sans la garantie qui lui est promise par C. C. 1535.—Q. B.—*Blondin & Lizotte*, 15 R. L., p. 130.

49. Que le vendeur d'un immeuble, avec garantie, doit le libérer de toute hypothèque avant d'obliger l'acheteur à passer un titre et à payer le prix convenu.—Q. B.—*Burroughs & Wells*, 15 R. L., p. 228, M. L. R., 3 Q. B., p. 42.

50. Where real estate is sold free and clear of incumbrance, the purchaser to pay the price in cash to the vendor, and it appears that such property is in reality charged with hypothecs, the purchaser is not bound to execute a deed until the seller has caused the hypothecs to be discharged.—TAIT, J.—*Greene vs Mappin*, M. L. R., 3 S. C., p. 393.

See also cases noted at C. C. 1532.

1536. [The seller of an immoveable cannot demand the dissolution of the sale by reason of the failure of the buyer to pay the price, unless there is a special stipulation to that effect.]—*ff lib.* 18, tit. 3, *De lege com.*; Cod., L. 8, *De contr. empti et vend.*, L. 1, L. 3, *De pactis in empt. et vend.*; Pothier, *Vente*, n. 458; 1 Despeisses, p. 48, n. 19; 2 Troplong, *Vente*, n. 621, p. 96; Domat, *loc. cit.*, n. 8, sec. 12, n. 1; Pothier, *Vente*, n. 475, § 4; C. L., 2539; C. N., 1654; C. C., 1065. [II. 55 to 57.]

Amendments:—See amendments noted at C. C. 1537.

Digitized by Google

DECISIONS :—1. The vendor of real estate has a revocatory action on default of payment of the purchase money, whether such purchase be made with or without delay for the payment of the price. In this case, the *bailleur de fonds*, who has not registered, can demand a resiliation of the sale on default of payment of the purchase money to the prejudice of a subsequent purchaser who has undertaken to pay him and who has caused his deed of purchase to be registered at length.—Q. B.—*Patenaude & Lériger*, 7 L. C. R., p. 66.

2. An action *en résolution de vente* by a vendor for non-payment of the price of sale is not affected by the non-registration of the deed or by the fact of the vendor having been an opposant to an application for ratification of title on a sale made by his immediate vendee.—BERTHELOT, J.—*David vs Girard*, 12 L. C. R., p. 79.

3. On an action brought by the vendor of a lot of land against the vendee and a third party to whom the land had afterwards been sold, praying for the resolution of both deeds of sale by reason of the non-payment of the balance of purchase money due under the first deed of sale, it was held that the action could not be maintained inasmuch as there was no offer by the plaintiff to reimburse to the second purchaser certain sums paid by him on account of a debt indicated in both deeds as due to the *seignieur* and also a certain sum paid on account of a joint and several obligation of the vendee and the plaintiff, for the payment of which the land in question was mortgaged by the first purchaser.—SMITH, J.—*Surprenant vs Surprenant*, 12 L. C. R., p. 397.

4. An action *en résiliation de vente* may be maintained by an unpaid vendor of an immoveable against his vendee at any time within thirty years from the date of the deed, in the event of the balance of the *prix de vente* remaining unpaid, and the judgment will be declared *commun* to a co-defendant, purchaser from such vendee, who will be condemned to give up the property, unless he prefer to pay the balance of the price, with interest and costs.—MONK, J.—*Poirier vs Tassé*, 13 L. C. R., p. 459.

5. Le vendeur non payé qui n'a pas vendu sans jour et sans terme, n'a que l'action en résolution et non l'action en revendication comme en droit romain ; encore qu'il se soit réservé son droit de propriété jusqu'à parfait paiement et le droit de reprendre sa chose, en cas de non-paiement, même sans procédés judiciaires.—Q. B.—*Brown & Lemieux*, 3 R. L., p. 361.

6. Par ces mots : " Promesse de vente avec tradition et possession actuelle " équivaut à vente," il faut entendre qu'une telle promesse, tout en liant celui qui promet assez énergiquement pour que la vente s'ensuive forcément si l'autre partie remplit les conditions du contrat, ne signifie pas néanmoins qne telle promesse de vente est, en droit, la même chose qu'une vente ; telle promesse n'a pas l'effet de transporter le droit de propriété en la personne du stipulant, lorsqu'il appert par les termes du contrat que telle n'a pas été l'intention des parties, mais qu'au contraire elles ont voulu réserver cet effet à un acte postérieur et conserver le droit de propriété en la personne du promettant.—Le droit de demander la résolution de la vente, faute de paiement du prix, appartient au vendeur, malgré qu'il ait stipulé comme remède à l'inexécution des conditions de la part de celui qui a promis d'acheter, la revente ou reprise des biens vendus, surtout s'il a stipulé ce remède sans préjudice à tout autre droit. La clause par laquelle le vendeur se réserve le droit de " se faire remettre, reprendre et revendiquer," n'est rien autre que le pacte commissoire.—La position du prometteur n'est sous

Digitized by Google

ce rapport nullement changée par la faillite de celui à qui il a promis de vendre. —MACKAY, J.—*Renaud vs Arcand*, 14 L. C. J., p. 102.

7. A vendor of immoveables, (before the passing of the code,) who has assigned portion of the purchase money, can, nevertheless, bring a resolutory action by reason of the default of the vendee to pay any portion of the purchase money ; the intervention in such action by the assignees, containing a declaration of acquiescence in such action, places the plaintiff's right of action beyond question.—The sale of government timber limits is a sale of an immoveable.—*Semble* : That the resolutory action would lie, even if such last mentioned sale were really a sale of moveables.—Q. B.—*Watson & Perkins*, 18 L. C. J., p. 261.

8. Dans le ressort de la coutume de Paris le cessionnaire pur et simple d'un prix de vente sans autre stipulation, pouvait exercer l'action en résolution de vente pour défaut de paiement soit total, soit partiel du prix. La demande en résolution pouvait aussi être formée pour défaut de prestation d'une rente constituée, prix d'un immeuble—même par le vendeur qui avait poursuivi le paiement du prix.—C. R.—*St-Cyr vs Millette*, 3 Q. L. R., p. 369.

9. Avant la promulgation du Code, le vendeur avait sans stipulation à cet effet, le droit d'exercer l'action en résolution de vente faute de paiement, soit partiel, soit total, du prix, et même faute de prestation de la rente constituée représentant le prix. Ce droit de résolution peut être exercé par le vendeur, qui n'a pas fait renouveler l'enrégistrement de son titre à l'encontre des créanciers hypothécaires dont les droits sont régulièrement enrégistrés. Le vendeur non payé, qui n'a pas exercé son droit de résolution avant le décret de l'immeuble, peut convertir sa demande en réclamation sur les deniers et être préféré aux créanciers enregistrés.—JETTÉ J.—*Compagnie de Prêt et de Crédit Foncier vs Garand*, 3 L. N., p. 379.

10. In this case, a judgment in resolution of the sale was given for default of payment of the interest of the purchase money, the capital itself not being due.—C. R.—*Brunet vs Lacoste*, 4 L. N., p. 245.

1537. [The stipulation and right of dissolution of the sale of an immoveable, by reason of non-payment of the price, are subject to the rules relating to the right of redemption contained in articles 1547, 1548, 1549, 1550, 1551, 1552.

The right can in no case be exercised after the expiration of ten years from the time of sale.]—Loyseau, *Déguerpissement*, liv. 6, ch. 3, n. 90 ; 2 Troplong, *Vente*, n. 651 ; 2 Troplong, *Hypothèques*, n. 466, p. 160. [II. 57.]

Amendments : The Act intituled " An Act respecting the sale and management of the Public Lands " enacts as follows.

If the commissioner of crown lands is satisfied that any purchaser, grantee or locatee or lessee of any public land, or any assignee claiming under or through him, has been guilty of any fraud or imposition, or has violated or neglected to comply with, any of the conditions of sale, grant, location or lease, or of the licence of occu-

Digitized by Google

pation or if any such sale, grant, location or lease, or license of occupation has been, or is, made or issued in error or mistake, he may cancel such sale, grant, location, lease or license, and resume the land therein mentioned, and dispose of it as if no sale, grant, location or lease thereof had ever been made; and all such cancellations heretofore made shall continue until altered.— Q. 32 Vict., cap. 11, s. 20.

The Act intituled : " An Act to amend the laws respecting the management of the Crown Lands " amends the above cited Act and enacts as follows.

The twentieth section of the said act is and shall be interpreted as giving to the revocation made by the commissioner of crown lands, in virtue of the said section, the effect of a full and complete forfeiture of all moneys paid by the purchaser, grantee, occupant or lessee, whether on account of, or in full payment of any sale, grant, location, lease or permit of occupation, or any expenses or improvements laid out or made on the land or lands therein mentioned. The commissionner of crown lands may nevertheless in all such revocations, grant such compensation or indemnity as he may consider just and equitable. The right of revocation so conferred on the commissioner of crown lands, shall not be deemed an ordinary right of dissolution of contract for non-fulfilment of conditions, and shall not be subject to the provisions of article 1537 of the Civil Code, or the rules thereir mentioned and may always be exercised as occasion may require at whatever length of time after the sale, grant, location, lease or permit of occupation.

Provided always, that this present section shall not affect any cases pending or any judgment rendered by any competent court contrary to the preceding provisions.—Q. 36 Vict. cap. 8, s. 6.

DECISIONS:—1. An action *en résiliation de vente* by a vendor for non-payment of the price of sale is not affected by the non-registration of the deed or by the fact of the vendor having been an opposant to an application for ratification of title on a sale made by his immediate vendee.—BERTHELOT, J.—*David vs Girard*, 12 L. C. R., p. 79.

2. In the case of a deed of sale in consideration of a *rente viagère*, the retrocession by the purchaser to the vendor by reason of a *pacte commissoire* will not be viewed in the light of a re sale to the original vendor, so as to admit of intermediate mortgagees obtaining a preference over the original vendor, provided that the retrocession be made without fraud and that the property retroceded be in the same state and of the same value as when originally sold, and in such case it is not necessary that the *pacte commissoire* should be enforced by means of a judgment of a Court of Justice.—Q. B.—*People's Building Society & Evans*, 13 L. C. R., p. 288.

3. The unpaid vendor of an immoveable, who has instituted an *action résolutoire*, for non-payment of the price, before the *décret* of the property, (although the judgment be not rendered until some months after) has a right to be paid

Digitized by Google

by preference even to a mortgagee, whose hypothec has been registered two years before the registration of the deed of sale by the vendor.—Q. B.—*Gauthier & Valois*, 18 L. C. J., p. 26.

1538. [The judgment of dissolution by reason of non-payment of the price is pronounced at once, without any delay being granted by it for the payment of the price; nevertheless the buyer may pay the price with interest and costs of suit at any time before the rendering of the jugment.]—Pothier, *Vente*, n. 459, 3e al., n. 461, 2e al. [II. 57.]

1539. The seller cannot have possession of the thing sold, upon the dissolution of the sale by reason of non-payment of the price, until he has repaid to the buyer such part of the price as he has received, with the costs of all necessary repairs, and of such improvements as have increased the value of the thing, to the amount of such increased value. If these improvements be of a nature to be removed, he has the option of permitting the buyer to remove them. —Pothier, *Vente*, n. 469, 470. [II. 57.]

DECISIONS:—1. In an action *en résiliation de vente* the rents, issues and profits of the property from the date of sale will be declared to have been compensated and will be set off against any sums paid to the Plaintiff or on his behalf by his immediate vendee.—MONK, J.—*Poirier vs Tassé*, 13 L. C. R., p. 459.

2. The principle laid down in this article applies to the case of a promise of sale as well as to an absolute sale.—Q. B.—*Nault & Price*, 4 Q. B. R., p. 354.—PRIVY COUNCIL.—12 App. Cas. p. 110, 13 Q. L. R. p. 286.

1540. The buyer is obliged to restore the thing with the fruits and profits received by him, or such portion thereof as corresponds with the part of the price remaining unpaid.

He is also answerable to the seller for the deteriorations of the property which have been caused by his fault.—Pothier, *Vente*, 465, 466, 468. [II. 57.]

1541. The seller is held to have abandoned his right to recover the price when he has brought an action for the dissolution of the sale by reason of the non-payment of it.—*ff* L. 4, § 2, *De lege com.*; Pothier, *Vente*, n. 461; 1 Despeisses, p. 73. [II. 57.]

DECISION:—Dans le ressort de la coutume de Paris le cessionnaire pur et simple d'un prix de vente, sans autre stipulation, pouvait exercer l'action en résolution de vente pour défaut de paiement, soit total, soit partiel du prix. La demande en résolution pouvait aussi être formée pour défaut de prestation d'une rente constituée, prix d'un immeuble, même par le vendeur qui avait poursuivi le paiement du prix.—C. R.—*St-Cyr vs Milette*, 3 Q. L. R., p. 369.

Digitized by Google

1542. [A demand of the price by action or other legal proceeding does not deprive the seller of his right to obtain the dissolution of the sale by reason of non-payment.]—1 Tropl., *Priv. et Hyp.*, n. 224 *bis*; 1 Duvergier, nn. 444 et seq.; Merlin, Quest. vo. *Option*, § 1, n. 10; Rép., vo. *Résolution*; 16 Duranton, n. 239; *Contrà ff* L. 7, *dict. tit.*; 1 Despeisses, p. 73, nn. 3, 4; Pothier, *Vente*, n. 462. [II. 57.]

1543. In the sale of moveable things the right of dissolution by reason of non-payment of the price can only be exercised while the thing sold remains in the possession of the buyer without prejudice to the seller's right of revendication as provided in the title *Of Privileges and Hypothecs.*—Cout. de Paris, 170; 1 Bourjon, p. 145, sec. 1, 2; Troplong, *Vente*, p. 531, add., to art. 1654; Troplong, *Priv. et Hyp.*, n. 395; C. C. V., 1187. [II. 59.]

Amendment: Article 1543 of the Civil Code is amended by adding thereto the following paragraph:

"In the case of insolvency such right can only be exercised "during the fifteen days next after the delivery."—Q. 48 Vict., cap. 20, s. 1.

DECISIONS:—1. The unpaid vendor of moveables has a right, under art. 1543 of the Civil Code, to demand the resolution of the sale, under the circumstances stated in that article, even after the expiration of the eight days allowed for revendication by article 1999.—In an action claiming such resolution the plaintiff has a right to attach the moveables by a *saisie conservatoire*, and, although his attachment may be in the nature of a *saisie-revendication*, it will nevertheless avail to him as a *saisie conservatoire*.—Q. B.—*Henderson & Tremblay*, 21 L. C. J., p. 24.

2. See the opinion of counsel in the matter of A. & C. J. Hope, noted at 6 L. N., p. 18.

3. Que le vendeur non payé d'une partie du prix peut exercer l'action en résolution de la vente jusqu'à concurrence de la balance à lui due, soit en remboursant la partie du prix reçue, soit en demandant la résolution de la vente pour partie lorsque les choses vendues sont divisibles. Que le vendeur a le droit à la saisie conservatoire pour conserver sur les effets vendus les droits et privilèges qu'il a comme vendeur, jusqu'à la décision de sa demande en résolution de la vente.—RAINVILLE, J.—*Pambrun vs Park*, 12 R. L., p. 363.

4. La vente sans terme, même suivie de la tradition, ne transférant pas la propriété qu'en autant que le vendeur est payé, celui-ci peut, s'il n'a pas été payé, revendiquer dans les huit jours de la livraison, la chose vendue, si elle est entre les mains de l'acheteur.—Q. B.—*Blagdon & Labelle*, 5 Q. L. R., p. 87.

5. Que les créanciers d'un débiteur insolvable qui a remis des marchandises au vendeur non payé, ne peuvent obliger les vendeurs qui ont repris leurs marchandises de les remettre à la masse, vu que ses créanciers ne peuvent se plaindre de cette remise, attendu que ces marchandises n'ont pas été payées et que les vendeurs avaient un privilége sur icelles pour le prix de vente. (But see Act

Digitized by Google

amending this article cited above).—Q. B.—*Boisseau & Thibaudeau*, 12 R. L., p. 672.

6. La faillite de l'acheteur ne fait pas obstacle à la résolution, faute de paiement, de la vente à terme.—CASAULT, J.—*Greenshteld vs Dubeau*, 9 Q. L. R., p. 353.

7. Similar decision—TORRANCE, J.—*Hughes vs Cassils*, 7 L. N., p. 367.

8. That under C. C. 1543, the unpaid vendor has the right to resiliate the sale of moveables, so long as the property sold remains in the possession of the purchaser and that this right may be validly exercised voluntarily between the parties, without legal proceedings.—Q. B.—*Thibaudeau & Mills*, 29 L. C. J., p. 149.

9. Que le recours du vendeur non payé de faire résilier la vente lorsque le débiteur est insolvable et entièrement distinct de son droit de faire saisir-revendiquer les choses vendues ; que le §2 de l'article 1999 du Code Civil, qui exige pour la saisie-revendication que les choses vendues soient entières et dans le même état, ne s'applique pas à la résolution de la vente ; que par suite, le vendeur peut faire résilier la vente même lorsque les marchandises vendues ont été mêlées au stock du débiteur, si elles peuvent être identifiées.—CIMON, J.—*Brown vs Labelle.* M. L. R., 2 S. C., p. 114.

10. That under article C. C. 1543, the unpaid vendor has the right to bring an action to dissolve a sale of goods, for non-payment of the price, whenever he can find the goods in the possession of the vendee, although the delays mentioned in C. C. 1998 and 1999 may have expired, and that creditors of the vendee have no greater rights than their debtor in opposing the dissolution of such sale at the demand of the unpaid debtor. (But see Act amending this article, cited above.) —Q. B.—*Ralston & Stansfield*, 31 L. C. J., p. 1.

11. Que celui qui vend à terme des marchandises à une personne insolvable, ignorant l'insolvabilité de l'acheteur qu'il découvre ensuite, n'a pas le droit de les revendiquer, en alléguant la fraude et l'insolvabilité, si l'acheteur avant la revendication les a transportés à une banque comme garantie collatérale d'un prêt par reçu d'entrepôt.—Q. B.—*Moss & Banque St. Jean*, 15 R. L., p. 353.

12. That the "delivery" mentioned in C. C. 1543, as amended by the Act Q. 48 Vict., ch. 20, s. 1, means actual delivery into the possession of the purchaser and not such constructive delivery as results from the putting of goods for shipment into the hands of a carrier.—ANDREWS, J.—*Rogers vs Mississippi & Dominion S. S. Co.*, 14 Q. L. R., p. 99.

See also cases noted at C. C. 1544.

1544. In the sale of moveable things the buyer is obliged to take them away at the time and place at which they are deliverable. [If the price have not been paid the dissolution of the sale takes place, in favor of the seller, of right and without the intervention of a suit, after the expiration of the delay agreed upon for taking them away, or if there be no such agreement, after the buyer has been put in default in the manner provided in the title *Of Obligations*;] without prejudice to the seller's claim for damages. — Pothier, *Vente*, 290-1 ; 2 Troplong, *Vente*, 677 et seq.; 1 Duvergier, 474; 4 Zach., p. 305, notes 1, 2; p. 306, notes 3, 4; C. N., 1657; 6 Marc., p. 296; 16 Duranton, 87; C. C., 1067, 1068, 1069, 1152. [II. 29.]

Digitized by Google

DECISIONS :—1. Que la résolution stipulée de la vente faute de paiement du prix peut être demandée par le vendeur qui a transporté le prix comme sûreté du paiement d'une dette par lui due ; mais que, dans ce cas, la résolution doit être à la condition que le demandeur dégage le prix par lui donné en nantissement.—C. R.— *Farmer vs Bell*, 6 Q. L. R., p. 1.

2. The plaintiffs in Montreal were bound by a contract to pay for the goods supplied by defendants in Scotland, upon receipt of invoice and bill of lading. They failed to pay for one lot until fifteen days after receipt of bill of lading, and it was held that the defendants were justified in cancelling the contract.—TORRANCE, J.—*Russell vs Maxwell*, 6 L. N., p. 91.

3. The fact that the buyer gave a note for the price of goods which note was discounted at a bank by the seller, does not affect the right of the latter to dissolve the sale, when the note is not paid at maturity.—JOHNSON, J.—*Rea vs Kerr*, 7 L. N., p. 157.

4. Que le droit à la résolution de la vente, faute de paiement au terme, est distinct de la revendication dans la huitaine (C. C. 1998 & 1999) des meubles vendus sans termes, et que la première subsiste après l'expiration du délai fatal à la seconde. Que le créancier qui a un privilège sur des meubles, peut l'assurer par une saisie conservatoire.—CASAULT, J.— *Wiser vs Murphy*, 9 Q. L. R., p. 327.

5. Que lorsque les biens d'un failli sont vendus sur une soumission, et que l'acheteur refuse, sans raison, d'en payer le prix et d'en recevoir la livraison, la vente est résolue de plein droit, après la mise en demeure de l'acheteur, et le vendeur peut, après les avis nécessaires faire revendre les effets à la folle enchère de l'acheteur et à ses risques et périls. Dans ce cas, la différence du produit de la vente compensera ce que ce dernier aura payé comptant.—TASCHEREAU, J.— *Desmarais vs Picken*, M. L. R., 1 S. C., p. 185.—C. R.—M. L. R., 1 S. C., p. 477.

6. Que la résolution de la vente prononcée par l'article 1544 C. C. n'est établie qu'en faveur du vendeur, qui peut revendre une partie des effets vendus, et poursuivre l'acheteur pour le paiement de la balance du prix des effets qu'il n'a pu vendre.—MATHIEU, J.—*Riopelle vs Fleury*, 12 R. L., p. 303.

7. Qu'en matière commerciale, lorsque l'acheteur néglige de donner au vendeur un billet promissoire, tel qu'il aurait été convenu, ce dernier peut alors et avant l'expiration du terme, poursuivre l'acheteur pour le montant de la vente. Qu'il peut aussi dans le cas précédent, offrir le montant de la vente en compensation à l'encontre d'un billet promissoire dont l'acheteur réclame le paiement contre lui. (C. C. 1188.)—C. R.—*Quintal vs Aubin*, M. L. R., 1 S. C., p. 397.

8. Que la faillite de l'acheteur ne fait pas obstacle à la résolution faute de paiement de la vente à terme. Que le règlement du prix de marchandises par lettre de change ou billet promissoire, n'est pas un paiement, ni, sans circonstances extraordinaires, une novation de la dette, et n'empêche pas la résolution de la vente à terme faute de paiement, mais que le vendeur doit, pour l'obtenir, remettre les valeurs reçues.—CASAULT, J.— *Greenshields vs Dubeau*, 9 Q. L. R., p. 353.

9. That when a bill of exchange for the price of goods is enclosed to the buyer for acceptance, together with the bill of lading which has been made to the order of the seller's agent and which is the symbol of the property in the goods, the buyer cannot lawfully retain the bill of lading without accepting the bill of exchange and, if he do so retain it, he thereby acquires no right to the bill of lading or to the goods.—C. R.—*MacGillivray vs Watt*, 31 L. C. J., p. 49.—Q. B. —31 L. C. J., p. 278.

Digitized by Google

10. An unpaid vendor is not entitled at the same time to pray for the resiliation of the sale and also that the goods be sold and that he be paid, by privilege, from the proceeds; but he is entitled to pray for the resiliation of the sale and the return of the goods without offering the buyer the option of paying the price.—LORANGER, J.—*Wylie vs Taylor*, M. L. R., 2 S. C., p. 374.

11. Qu'un vendeur qui accorde à l'acheteur un délai pour le paiement du prix convenu, ne peut ensuite refuser de livrer les marchandises vendues et exiger des garanties à moins que l'acheteur ne soit devenu insolvable, de manière à ce que le vendeur soit dans un danger imminent de perdre sa créance; et un plaidoyer à une action réclamant des dommages pour défaut de livraison, qui n'allègue pas cette insolvabilité est mal fondée en droit et peut être renvoyé sur réponse en droit.—WURTELE J.—*Collette vs Lewis*, M. L. R., 4 S. C., p. 23.

See also cases noted at C. C. 1496 (?) and 1543.

CHAPTER SIXTH.

OF THE DISSOLUTION AND OF THE ANNULLING OF THE CONTRACT OF SALE.

1545. Besides the causes of dissolution and of nullity already declared in this title, and those which are common to contracts, the contract of sale may be dissolved by the exercise of the right of redemption.—Domat, liv. 1, tit. 2, sec. 12, *Intr.*, art. and n. 6; Pothier, *Vente*, nn. 330, 385; C. N., 1658. [II. 59].

Amendments:—The Act intituled "An Act to facilitate re-entry upon abandoned Lands in certain cases," provides as follows:—

1. Whenever land has been sold, under a deed of sale, and the seller is entitled, by reason of non-payment of price or any other cause, to demand the dissolution of the sale, and the buyer has abandoned the land and has left it so abandoned during two years or a longer period, then the seller may proceed in a summary manner as hereinafter provided to recover back the land so sold, and re-enter into possession of the same.

2. A notice shall be served upon the buyer stating that at a time and place therein mentioned the seller will apply to a judge of the superior court to recover back the land, or, if the buyer cannot be found within the district, he may be ordered to appear in the manner prescribed by article 68 of the code of civil procedure.

The notice shall likewise be served upon any person then in actual possession of the land.

3. The delay between the service of the notice and the day on which the application is to be made shall be that prescribed for

Digitized by Google

ordinary cases by article 75 of the said code, or that given by the said article 68, as the case may require.

4. After notice has been so given, and at the time and place mentioned in the notice, the seller may, by a petition setting forth the facts of the case and supported by affidavit, and production of the written evidence of sale, if in his hands, apply to a judge of the superior court to have the deed of sale declared void, and to be put in possession of the land.

5. No contestation of the said petition shall be allowed except by counter-affidavits produced within three days after the presenting of the petition.

6. After the said delay of three days the judge may, in his discretion, either reject the petition or render a jugdment declaring the deed of sale void, and authorizing the petitioner to take possession of the land. In the event of the judgment rejecting the petition, it shall not prejudice the seller in any right he may have by law of bringing an action in the ordinary manner.

7. No such judgment shall be rendered if at any time before the rendering thereof the buyer or any person for him or holding under him shall have paid either to the seller or into the office of the prothonotary of the superior court the full amount of any instalments of purchase money or interest due in virtue of the deed of sale, or shall have fulfilled every obligation entered into therein by the failure to fulfil which the seller had become entitled to demand the dissolution of the sale.

8. If the seller is prevented by any person or persons from taking possession of the land in virtue of the said judgment, he may demand and obtain from the prothonotary of the superior court a writ of possession to eject such person or persons and to place the seller in possession, and article 550 of the code of civil procedure shall apply to such writ.

9. The buyer may obtain a review of the same judgment, and articles 495 to 504 inclusively of the code of civil procedure shall apply to such review.

10. All documents forming part of the proceedings under this act shall form part of the records of the superior court.

11. Articles 2148, 2152 and 2153 of the civil code shall apply to the registration of any judgment rendered under this act, and to the cancelling of the registration of any deed of sale declared void by such judgment, but article 2154 shall not apply if under section 2 of

Digitized by Google

this act, the buyer has been notified in the manner prescribed by article 68 of the code of civil procedure.

12. In construing and applying this act every buyer who having ceased to occupy the land by himself or by his family, has either made no transfer of his rights in the land or has made a transfer, but has not notified the seller in writing of such transfer, shall be deemed to have abandoned the land; and no actual possession of the land by any person shall be deemed to be a notice of any such transfer.

13. The words " deed of sale " in this act shall mean and include not only any deed of sale but also any promise of sale or contract in the nature of a promise of sale followed by tradition and actual possession.—Q. 33 Vict., cap. 16.

The Act intituled " An Act respecting re-entry upon certain " abandoned lands in seigniories, " enacts as follows:

1. Whenever, in any seigniory, a *censitaire* at any time before or after the passing of this act has abandoned any land held by him subject to the payment of any seigniorial dues or constituted rents created in lieu thereof, and such land has remained so abandoned during twenty years or a longer period, and arrears of such seigniorial dues or rents for more than ten years have not been paid, then the seignior may proceed in a summary manner as hereinafter provided to recover back such land and re-enter into possession of the same.

(The remaining sections of the Act prescribe the procedure to be taken to effect this object).—Q. 34 Vict., cap. 7.

SECTION I.—OF THE RIGHT OF REDEMPTION.

1546. The right of redemption stipulated by the seller entitles him to take back the thing sold upon restoring the price of it, and reimbursing to the buyer the expenses of the sale and the costs of all necessary repairs, and of such improvements as have increased the value of the thing, to the amount of such increased value.

The seller cannot have possession of the thing until he has satisfied all these obligations.—Domat. *loc. cit.*, n. 6; Pothier, *Vente*, 385, 411, 421-3-4-6; 2 Troplong, *Vente*, 762; 6 Marc., pp. 307-8; C. N., 1659, 1673. [II. 59.]

DECISIONS:—1. Dans une vente à réméré, la loi n'exige pas des offres réelles et une consignation préalable pour que le vendeur puisse exercer la faculté de réméré.—Des offres irrégulières ou verbales sont suffisantes.—Q. B.—*Dorion & St-Germain*, 15 L. C. J., p. 316.

2. That a vendor cannot exercise the right of redemption stipulated in his

Digitized by Google

favor, until he has tendered the price of the property sold.—Q. B.—*Demers & Lynch*, 1 Q. B. R., p. 341.

3. Que le vendeur des choses mobilières, dans l'espèce des actions d'une compagnie de chemin de fer, qui se réserve le droit de racheter les choses vendues pendant un certain temps pour un prix déterminé, aura, contre l'acheteur, s'il lui offre, dans le délai fixé, le montant convenu et un recours en dommage si ce dernier les revend à un tiers, et que la mesure de ce dommage sera le prix reçu par le second acquéreur.—Q. B.—*McDougall & McGreevy*, 16 R. L., p. 1, 14 Q. L. R., p. 30.

1547. When the seller takes back the property under his right of redemption, he receives it free from all incumbrances with which the buyer may have charged it.—Domat, *loc. cit.*, n. 7; Pothier, *Vente*, 430; C. N., 1673. [II. 61.]

DECISIONS:—1. In the case of a deed of sale in consideration of a *rente viagère*, the retrocession by the purchaser to the vendor by reason of a *pacte commissoire* will not be regarded in the right of a re-sale to the original vendor so as to admit of intermediate mortgagees obtaining a preference over the original vendor, provided that the retrocession be made without fraud and that the property retroceded be in the same state and of the same value as when originally sold, and in such case it is not necessary that the *pacte commissoire* should be enforced by means of a judgment of a Court of Justice.—Q. B.—*People's Building Society & Evans*, 13 L. C. R., p. 288.

2. Que le vendeur à réméré conserve un *jus in re* dans la chose vendue, et le voisin peut le joindre à l'acheteur dans une demande en bornage.—CASAULT, J. —*Lemieux vs Lemieux*, 10 Q. L. R., p. 365.

1548. [The right of redemption cannot be stipulated for a term exceeding ten years.

If it be stipulated for a longer term, it is reduced to the term of ten years.]—Domat, *loc. cit.*, n. 9; Pothier, *Vente*, 433 et seq.; *Intr. au titre*, 14 *Cout. d'Orl.*, s. 2; C. L., 2546; C. N., 1660. [II. 61.]

1549. [The stipulated term is to be strictly observed. It cannot be extended by the court.]—C. L., 2547; C. N., 1661. [II. 61.]

DECISIONS:—1. The action *en réméré* must be returned into court before the expiration of the stipulated delay, and not merely served within that time, and must be accompanied by *offres réelles*.—C. R.—*Walker vs Sheppard*, 19 L. C. J., p. 103.

2. The action *en réméré* need not be returned into court before the expiration of the stipulated delay.—JETTÉ, J.—*Trudel vs Bouchard*, 27 L. C. J., p. 218.

3. Where a *droit de réméré* is stipulated on payment of a fixed sum within a specified time, the entire sum must be paid within the delay.—TASCHEREAU, J. —*Goodwater vs Henderson*, 4 L. N., p. 206.

4. Where a property was sold and the purchaser bound himself to re-convey it to the vendor within three months from the time that he (the purchaser) should

Digitized by Google

have completed a house then in course of construction thereon on being paid $3,000, it was held to have been the duty of the purchaser to notify the vendor of the completion of the house and that, in default of such notice, the right of redemption might be exercised by the vendor after the expiration of the stipulated delay.—Q. B.—*Leger & Fournier*, M. L. R., 3 Q. B., p. 124.—Confirmed in the SUPREME COURT.—10 L. N. p. 324.

1550. [If the seller fail to bring a suit for the enforcement of his right of redemption within the stipulated term, the buyer remains absolute owner of the thing sold.]—C. L., 2548; C. N., 1662. [II. 61.]

Amendment.—See amendment noted at C. C. 1040.

1551. [The term runs against all persons, including minors and those otherwise incapable in law, reserving to the latter such recourse as they may be entitled to.]—C. L., 2549; C. N., 1663. [II. 61.]

1552. The seller of immoveable property may exercise his right of redemption against a second buyer, although the right be not declared in the second sale.—Pothier, *Vente*, 396-8,428; Tropl., *Vente*, 728-9; C. N., 1664. [II. 61.]

1553. The buyer of a thing subject to a right of redemption holds all the rights which the seller had in the thing. He may prescribe as well against the true proprietor as against those having claims and hypothecs on the thing.—Pothier, *Vente*, 385 and 402 *in fine*; C. L., 2551; C. N., 1665. [II. 61.]

1554. He may set up the benefit of discussion against the creditors of the seller.—C. L., 2552; C. N., 1666. [II. 61.]

1555. If the buyer of an undivided part of an immoveable subject to the right of redemption become afterwards the buyer of the whole property, upon a sale by licitation instituted against him, and such right be not purged, he may oblige the seller who wishes to exercise it to take back the whole property.—2 Troplong, *Vente*, 744-5; 6 Marc., p. 304; 16 Duranton, n. 413; C. S. L. C., c. 48, s. 5; C. N., 1667. [II. 61.]

1556. If several persons sell conjointly, and by one contract, an immoveable which is their common property, with a right of redemption, each of them can exercise his right for the part only which belonged to him. — Dumoulin, *Tract de div. et indiv.*, nn. 582 et seq.;

Digitized by Google

Pothier, *Vente*, 397; 2 Tropl., *Vente*, 746 et seq.; C. C., Title *Of Obligations* C. 7, s. 5; C. N., 1668. [II. 61.]

1557. The rule declared in the last preceding article applies also if one seller of an immoveable have left several heirs; each of the coheirs can exercise the right of redemption for the part only which he has in the succession of the seller.—Dumoulin, Pothier, Tropl., *locis citatis*; C. N., 1669. [II. 63.]

1558. In the case stated in the two last preceding articles the buyer may, if he think fit, compel the co-vendor or the coheir to take back the whole of the property sold with the right of redemption, and in default of his so doing, he may cause the suit of such co-vendor or coheir for a part of the property to be dismissed.—Dum., Poth., Tropl.. *locis citatis;* C. N., 1670. [II. 63.]

1559. If the sale of an immoveable belonging to several owners be made not conjointly of the whole property together, but by each of them of his part only, they may exercise their right of redemption separately, each for the portion which belonged to him, and the buyer cannot oblige him to take back the whole.—Pothier, *Vente*, 396; Troplong, *Vente*, 754, 755; 6 Marcadé, p. 306, and authors cited by him; C. N., 1671. [II. 63.]

1560. If an immoveable have been sold to several buyers, or to one buyer who leaves several heirs, the right of redemption can be exercised against each of the buyers or coheirs for his part only; but if there have been a partition of the property among the coheirs, the right may be exercised for the whole property against any one of them to whom it has fallen.—Dumoulin, Pothier, *loc. cit.*; 2 Troplong, *Vente*, 756 et seq. and Dumoulin and Tiraqueau, as there cited; C. N., 1672. [II. 63.]

SECTION II.—OF THE ANNULLING OF SALE FOR CAUSE OF LESION.

1561. The rules relating to the avoiding of contracts for cause of lesion are declared in the title *Of Obligations*.—C. C., 1012; C. N., 1674. [II. 63.]

Digitized by Google

CHAPTER SEVENTH.

OF SALE BY LICITATION.

1562. If a thing, either moveable or immoveable, held in common by several proprietors cannot be partitioned conveniently and without loss, or if in a voluntary partition of a property held in common there be a part which none of the co-proprietors is able or willing to take, a public sale of it is made to the highest bidder, and the price is divided among them.

Strangers are admitted to bid at such sale.—Pothier, *Vente*, 515 ; C. S. L. C.. c. 48, ss. 3, 5 ; C. C. 300 ; C. N., 1686. [II. 63.]

DECISIONS :—1. Que l'usufruitier ne peut prendre une action en partage et licitation du fonds sur lequel porte son usufruit.—ROUTHIER, J.—*McNicholl vs Laberge*, 10 L. N., p. 130. But see judgment in C. R.—10 L. N., p. 153.

2. Qu'entre le nu propriétaire et l'usufruitier, il n'y a pas d'indivision qui puisse rendre nécessaire la licitation des immeubles dont l'un a la nue propriété et l'autre l'usufruit, ces deux droits n'étant pas de même nature, mais que, cependant, si l'usufruit d'immeuble appartient à un seul, et la nue propriété à plusieurs, la licitation peut avoir lieu ; mais ne doit porter que sur la nue propriété, et qu'il en doit être ainsi, alors même que l'usufruitier est en même temps co-propriétaire de la nue propriété.—MATHIEU, J.—*Kent vs Beaudin*, 16 R. L., p. 333.

1563. The manner and formalities of proceeding in sales by licitation are declared in the Code of Civil Procedure.—C. C. P., 919 et seq., ; C. N., 1688. [II. 63.]

CHAPTER EIGHTH.

OF SALE BY AUCTION.

1564. Sales by auction or public outcry are either forced or voluntary.

The rules relating to forced sales are declared in chapters seven and eleven of this title, and in the Code of Civil Procedure.—C. C. P., 919 et seq. [II. 63.]

1565. The voluntary sale by auction of goods, wares, merchandise or effects, cannot be made by any person other than a licensed auctioneer, subject to the following exceptions :

1. The sale of goods or effects belonging to the crown, or seized

Digitized by Google

by a public officer under judgment or process of any court or as being forfeited ;

2. The sale of goods and effects of deceased persons or belonging to any dissolution of community of property or to any church ;

3. Sales by the inhabitants in the rural districts, not for trading purposes, of their furniture, grain, cattle, and other property not being merchandise and stock in trade, when changing their residence or finally disposing of the same ;

4. Sales by auction for municipal taxes under the act respecting municipalities.—C. S. L. C., c. 5, ss. 1, 2, 7. [II 65.]

Amendments :—109. With the exception of the immoveable and moveable property of the crown, of real and personal property sold by authority of justice, or through confiscation, of the real and personal property appertaining to any dissolution of community, or to any church, or which are sold at any bazaar held for religious or charitable purposes, or sold for religious purposes, or which are sold in payment of municipal taxes under the municipal code, or any other law regulating municipalities.

With the exception likewise of the real and personal property, grain or cattle sold for non-commercial purposes by the inhabitants of the rural districts, removing from the locality, and the goods of minors sold by forced or voluntary licitation.

All goods and effects and moveable and immoveable property, wares, merchandise and stock in trade, sold by auction and outcry in this Province and adjudged to the highest and last bidder therefor, shall be sold by a licensed auctioneer.

And such sales by auction are subject to a duty of one per cent on the amount thereof, which duty shall be paid, by the auctioneer, to the License Inspector out of the proceeds of the sale, at the cost of the seller, unless an express stipulation be made, in the condition of sale, that such duty shall be paid by the buyer, in which the case duty is added to the price.

110. Moveable property, wares, merchandise, stock in trade and active debts, comprising insolvent estates sold by auction under the laws on insolvency, remain chargeable with the duty of one per cent hereinbefore imposed, notwithstanding that the same may be sold otherwise than by a licensed auctioneer.

111. Whosoever, not being an auctioneer duly licensed as required by the present law (such license being at the time in force), sells, by public auction and by outcry, in this Province, any property, immoveable or moveable, effects, merchandise and stock in trade, subject to

Digitized by Google

auction duty, excepting such moveable property, effects, merchandise and insolvent's stock, mentioned in the preceding article, and whosoever causes such sale, whether he be proprietor or not of the property so sold, in violation of the terms of this article, shall incur a penalty for eaeh contravention thereof, at the maximum, in the sum of four hundred dollars and at the minimum, of two hundred dollars at the discretion of the tribunal pronouncing the same.

112. Such persons, selling without license, shall pay the duties on such sale, in the same manner, as if the sale had been under a a license.

In addition to the penalty aforesaid, whosoever without such license makes a sale so prohibited, as aforesaid, and who, within the thirty days following such sale, neglects to pay to the License Inspector, or to his agent, the amount of the duty on such sale, incurs a fine of twenty dollars for each day during such neglect.

113. The amount of such duty, and of such penalty may be recovered by the license Inspector by the same prosecution, and in default of payment of the amount in principal and costs thereof, the contravening person is liable to imprisonment, for such time as shall be pronounced by the tribunal, being not more than three months and not less than one month.

114. Every auctioneer shall under a penalty of twenty dollars keep in a book, preserved for that purpose, a detailed statement, in the form prescribed by the Treasurer, of all sales made by him, and give to said Treasurer all information by him required from time to time.

115. The License Inspector, his deputy, and every person authorised to that effect, by the Treasurer, shall have, at all times, access to such book, for its examination; and every auctioneer refusing to allow such examination incurs a penalty of fifty dollars for each contravention of this article.

116. Within the first ten days of each of the months of February, May, August and November of each year, every licensed auctioneer shall pay to the License Inspector or to his deputy, the amount of duties levied on the sales by him made, and not paid over.

He shall also furnish to the License Inspector, or his deputy, a full return, with a report, in detail, signed by himself or his assistant, chief clerk, agent or partner, stating the quantity of all moveable and immoveable property, effects, merchandise and stock in trade, subject to duty, which he has sold during the period not comprised in his last

Digitized by Google

return, stating the amount of the sales of each day, and the total amount of the sales made by each person, firm or estate.

If no sales have been made by such licensed auctioneer during said period, the same shall be mentioned in his return.

Such return shall in either case be attested, under the oath or affirmation of the person making the same.

117. The License Inspector or his deputy, may receive such oath or affirmation, and may put to the person making the same, all such questions as he may think fit, to which questions the deponent or affirmant shall make answer, under the sanction of the same oath or affirmation.

118. Every auctioneer and every person who sells goods by auction, charged with the duty of one per cent, but which goods may be sold by other than an auctioneer, who neglects to pay the amount of the duties, and to make the return aforesaid, in the required form, shall incur a penalty of twenty dollars, for each day he neglects so to do.

119. The amount of duties received, and not so paid over, may be recovered, with costs, in the same prosecution as for the penalties.

The person, so in default, becomes liable to have his license declared forfeited, and such license, from the day a notice, to that effect, is inserted by the License Inspector in the *Official Gazette*, is revoked, null and void, and no new license can be granted to such defaulter, until entire payment be made, in principal and costs, of the amount due.—Q. 41 Vict. cap. 3, ss. 109 to 119.

The act intituled "An Act to amend The Quebec License Law of 1878 (41 Vict. chap. 3) and its amendments," enacts as follows :

Section 111 of the said act is amended, by striking out the words : "four hundred dollars" in the eleventh and twelfth lines and substituting the words : "one hundred dollars" in place thereof and by striking out the words : "two hundred" in the twelfth line, and substituting the word : "fifty" in place thereof ; and by adding the following words to the said section to form part thereof :

"Any person who shall advertise any property for sale by him at auction over his signature, or who shall allow his name to be used in any newspaper, hand-bill, poster or other mode of advertising property for sale, without first having procured a license as an auctioneer, shall incur and be liable to a penalty of fifty dollars for each such offence, which may be recovered by the License Inspector of the District, in the same manner as provided for other offences against the License Act, one half of said penalty shall be paid into the Pro-

Digitized by Google

vincial Treasury and the remaining half to the License Inspector,"—Q. 43-44 Vict., cap. 11, s. 33.

1566. A sale by auction contrary to the provisions contained in the last preceding article, is not null ; it merely subjects the contravening parties to the penalties imposed by law.—[II. 65.]

1567. The adjudication of a thing to any person on his bid or offer, and the entry of his name in the sale-book of the auctioneer completes the sale to him, and he becomes owner of the thing, subject to the conditions of sale announced by the auctioneer, notwithstanding the rule contained in article 1235. The contract from that time is governed by the rules applicable to the contract of sale.—Smith, *Merc. Law*, (*Edit.* 1859), pp. 496, 507 ; Chitty, *On contracts*, (*Am. Ed.* 1865), p. 308, note 2, p. 389, note 1 ; Kent's Com. (5th *Ed.*), 539, 540 ; 1 Sugden, V. and P., c. 3, s. 3, p. 130 ; C. L., 2586, 2587. [II. 65.]

DECISIONS :—1. An auctioneer who sells a ship without naming his principal, cannot maintain an action for the sum offered by the last bidder, without a tender of a valid bill of sale.—K. B.—*Burns vs Hart*, 2 R. de L., p. 77.

2. An auctioneer who sells, without naming his principal, is liable in damages for the non-execution of his contract.—K. B.—*Hart vs Burns*, 2 R. de L., p. 79.

3. L'entrée du nom de l'adjudicataire, sur le livre de vente de l'encanteur, accompagnée de sa signature mise au-dessous de l'indication de l'objet vendu, forme la preuve du contrat intervenu entre le propriétaire et l'adjudicataire—Beaudry, J.—*Frigon vs Bussel*, 5 R. L., p. 559.

4. The sale of land in lots at public auction is governed by the French law Each adjudication of a lot is a separate contract.—Q. B.—*Jetté & McNaughton*, 20 L. C. J., p. 255.—Torrance, J.—19 L. C. J., p. 153.

5. See also the holdings in above case noted at C. C. 993, nn. 5 and 6.

6. Where a vendor seeks to enforce the sale of a lot of land, and tenders a deed to the purchaser differing in several unimportant particulars from the acknowledged conditions of sale, the court may vary and reduce the conditions sought to be imposed, and may order a deed to be executed, pursuant to the precise condition of sale.—An adjudication at auction on condition signed by the purchaser completes the sale as between the parties ; and where there is a stipulation that a deed shall be executed within ten days after a sale by auction, the failure of the vendor to tender a deed before the expiration of the delay does not *ipso facto* resolve the sale.—A stipulation in the condition of sale by auction that the vendor shall be entitled to proceed to *folle enchère* if the purchaser makes default, does not restrict the vendor's recourse to that remedy or exclude other actions.—Q. B.—*Liggett & Tracey*, 20 L. C. J., p. 313.

1568. If the purchaser do not pay the price at which the thing was adjuged to him, in conformity with the conditions of sale, the seller may, after having given reasonable and customary notice there-

Digitized by Google

of, again expose the thing to sale by auction, and if at the resale the price obtained for the thing be less than that for which it was adjudged to the first purchaser, the seller may recover from him the difference and all the expenses of the resale. But if at the resale a greater price be obtained for the thing, the first purchaser is not entitled to the benefit thereof, beyond the expenses of the resale and he is not allowed to bid at such resale.—Chitty, *On Contracts.* (*Edit. Am.* 1865), p. 430, note 2 and note 4 for cases cited ; Kent's Com. (5th *Edit.*), p. 504 ; Ruston vs Perry, n. 2155, 24 juillet 1848, Montréal ; C. L., 2589, 2590 ; Anc. Den., vo. *Folle Enchère*, n. 3 ; 1 Pardessus, *Dr. Com.*, n. 131, p. 258 ; Pothier, *Proc. civ.*, p. 254. [II. 65.]

DECISION :—Where a purchaser at an auction refuses to pay in compliance with the conditions of sale, the goods, after notice to him, may be resold and an action will lie against him for the difference between the price of the first and second sale together with all the costs and charges thereby incurred.—TASCHEREAU, J.—*Maxham vs Stafford*, 5 L. C. J., p. 105.

CHAPTER NINTH.

OF THE SALE OF REGISTERED VESSELS.

1569. Special provisions concerning the sale of registered ships or vessels are contained in the fourth book of this code in the title *Of Merchant Shipping.* [II. 65, III. 383.]

DECISION :—An auctioneer who sells a ship without naming his principal, cannot maintain an action for the sum offered by the last bidder, without a tender of a valid bill of sale.—K. B.—*Burns vs Hart*, 2 R. de L., p. 77.

CHAPTER TENTH.

OF THE SALE OF DEBTS AND OTHER INCORPOREAL THINGS.

SECTION I.—OF THE SALE OF DEBTS AND RIGHTS OF ACTION.

1570. [The sale of debts and rights of action against third persons, is perfected between the seller and buyer by the completion of the title, if authentic, or the delivery of it, if under private signature.]—Pothier, *Vente*, 316, 554; Paris 108 ; C. C. 1494; C. N., 1689. II. 67.]

Digitized by Google

Amendment: See the Act intituled " An Act respecting voluntary " sales, transfers and assignments of *rentes constituées* representing " seigniorial dues, created in virtue of seigniorial *cadastres* and the " signification of the said sales, transfers and assignments."—Q. 38 Vict., cap. 26.

DECISION :—The assignment of a debt accepted by the notary in the name of the assignee is sufficiently ratified and perfected by the signification which is made in the name of such assignee and takes effect from the day of such notification.—Q. B.—*Perrault & Ontario Bank*, 14 L. C. R., p. 5.

★**1571.** The buyer has no possession available against third persons until signification of the act of sale has been made, and a copy of it delivered to the debtor. He may, however, be put in possession by the acceptance of the transfer by the debtor, subject to the special provisions contained in article 2127.—Paris 108; Pothier, *Obl.* 502; *Vente*, 554; Lacombe, vo. *Transport*, n. 17 ; 3 Maleville, p. 366 ; C. N., 1690. [II. 67.]

Amendments : 3. Whenever, in the case of a sale of a debt or a right of action against a third person, the debtor has left or has never had his domicile in this province, the signification of the sale required by article 1571 of the civil code, may be affected, by publishing, in the form given in the schedule of this act, or in any form equivalent thereto, a notice of the said sale, twice in the French language, in a newspaper published in the French language, and twice in the English language, in a newspaper published in the English language, in the district in which the debt was contracted or in which the action has been instituted ; and in default of either of such newspapers in such district, then in a similar newspaper of the nearest locality.

The delivery of a copy of the act of sale, required by the said article 1571 may be effected, in either of the cases mentioned in this section, by leaving such copy for the debtor in the hands of the prothonotary of the district in which the signification was published.

4. Whenever in either of the cases mentioned in the preceding section, an action has been brought against the debtor, the service of the action, in the manner prescribed by article 68 of the code of civil procedure, shall be a sufficient signification of the act of sale, if in the order published in virtue of the said article, the sale is mentioned and described ; and the filing of a copy of the act of sale together with the return of the action, shall be a sufficient delivery thereof to the debtor.

5. Whenever a whole class of rents or debts collectively is sold,

Digitized by Google

whether such sale has been made before or after the coming into force of this act, the signification of sale required by article 1571 of the civil code may be effected by causing the act of sale to be published in the manner prescribed by section three of this act, and the delivery of a copy required by the said article may be effected by depositing a copy of the deed of sale in the office of the prothonotary of the district in which the succession opened, or in which the lands are situated in respect of which the debts are due, or of the district in which is or was the chief place of business of the original creditor. And such publication and deposit, once made, shall be a sufficient signification and delivery with respect to each debtor individually.—Q. 35 Vict., cap 6, ss. 3, 4, 5.

The Insolvent Act of 1875, sec. 69 (since repealed) affected this article in so far as sales of book debts by official assignees were concerned:

See also amendment noted at C. C. 1570,

DECISIONS:—1. Le délai accordé par le cédant à son débiteur par un acte subséquent à l'acte constitutif de la créance, mais antérieur au transport, peut être plaidé par exception à une action par le cessionnaire.—K. B.—*Langlois vs Verret*, 2 R. de L., p. 177.

2. An assignee can bring his action without notifying his deed of assignment to the debtor and the service of process in such case is equivalent to notification.—C. R.—*Martin vs Coté*, 1 L. C. R., p. 239.

3. A bailiff's certificate cannot be taken as authentic to establish the signification of an assignment before notaries.—C. R.—*St. John vs Delisle*, 2 L. C. R., p. 150.

4. An assignee may bring suit without having previously notified his deed of assignment to the debtor.—C. R.—*Quinn vs Atchison*, 4 L. C. R., p. 378.

5. In the case of the institution of an action by an assignee for the recovery of an amount assigned him, without previous notification of the assignment, no costs will be given to him and he will be condemned to pay costs to the Defendant, if the latter have tendered the amount due and paid the same into Court.—Duval & Meredith, JJ.—*Paré vs Dérouselle*, 6 L. C. R., p. 411.

6. No *lods* are due on the resiliation of a deed of donation which had not its perfect execution. The want of service (*signification*) of an assignment cannot deprive the assignee of his right to fyle an opposition *afin de conserver* to recover the debt assigned.—Q. B.—*Lamothe & Fontaine*, 7 L. C. R., p. 49.

7. A purchaser who had obtained a judgment against his vendor reducing the amount of the price of sale by reason of a *défaut de contenance*, may bring an action *en déclaration de jugement commun* against the assignee of the balance of the price of sale who has given notification of his assignment.—Q. B.—*Ryan & Idler*, 7 L. C. R., p. 385.

8. An assignment made by a debtor to trustees for the benefit of his creditors, subsequently resiliated by reason of the payment of his debts, is entitled to be replaced in full possession of the remainder of the affects assigned, as well

Digitized by Google

those that remain as the moneys, proceeds of those sold, and he is entitled to recover such effects, even in the hands of third parties, without notification of the judgment awarding him the effects, saving the question of costs upon the recovery.—Q. B.—*Hagan & Wright*, 11 L. C. R., p. 92.

9. In an action by a vendor for the balance of the price of a farm sold by him to the defendant, the defendant pleaded certain payments made before action brought to assignees of the plaintiff under assignments not signified. The plaintiff replied praying *acte* of his readiness to deduct the sums so paid and to give security against any demand for the balance claimed. It was held that, notwithstanding the facts above mentioned and the defendant's admission that the assignees had absconded from the Province previous to the institution of the action, the exception must be maintained and the action dismissed.—MONK, J.—*Orr vs Hébert*, 12 L. C. R., p. 401.

10. In an hypothecary action brought by a plaintiff, *cessionnaire* of a debt the signification of the action on the defendant, *tiers détenteur*, cannot be held as a signification of the transfer to the principal debtor. By the jurisprudence of Lower Canada the *cessionnaire* of a debt may maintain an action against the debtor without a previous signification to him of the *acte* of transfer.—Q. B.—*Aylwin & Judah*, 14 L. C. R., p. 421.

11. L'acceptation du transport ne rend pas le débiteur non recevable à opposer au cessionnaire les exceptions qu'il aurait pu opposer au créancier cédant.—SMITH, J.—*Masson vs Corbeille*, 2 L. C. J., p. 140.

12. Une action portée par le cessionnaire d'une créance sans signification du transport ou sans acceptation par le débiteur, sera renvoyée avec dépens sur une défense en droit.—TASCHEREAU, J.—*Mignot vs Reeds*, 9 L. C. J., p. 27.

13. While an action upon a transfer not signified may be maintained against the original debtor, an hypothecary action against a *tiers détenteur* upon such transfer, cannot be maintained without previous signification of the transfer upon the debtor. Partial payments by a debtor, on account of a debt transferred, or papers *sous seing privé*, showing that the debtor had a knowledge of the transfer, are equivalent to a transfer only as between the *cessionnaire* and the debtor, and not as between the *cessionnaire* and a third party.—Q. B.—*Aylwin & Judah*, 9 L. C. J., p. 179.

14. In a joint demand by two creditors under s. 3, § 2 of the Insolvent Act of 1864, against a debtor to make an assignment under the Act, the claims of one of the two creditors being based upon a transfer made to him by a third party, which was only signified upon the debtor several days after the demand of an assignment, cannot avail in support of the demand.—TORRANCE, J.—*Turgeon vs Taillon*, 13 L. C. J., p. 19.

15. The article C. C. 1571, does not apply to an action founded on a transfer without signification, when the only plea is that the defendant is not proprietor.—TORRANCE, J.—*Gibeau vs Dupuis*, 18 L. C. J., p. 101.

16. Un transport n'est parfait et le cessionnaire n'est saisi de la créance transportée et ne peut poursuivre en justice le recouvrement de telle créance, que lorsque le transport a été dûment signifié en en laissant copie au débiteur, ou que ce dernier l'a accepté.—Q. B.—*Charlebois & Forsyth*, 1 R. L., p. 606.

17. Un transport n'est pas nul par le fait que le cessionnaire ne l'a pas accepté personnellement, ni par un procureur spécialement autorisé à cette fin; et l'acceptation du notaire pour le cessionnaire est valable, pourvu que ce dernier

Digitized by Google

ratifie telle acceptation par des actes subséquents ; l'enregistrement du transport, à la réquisition du cessionnaire, est une ratification suffisante de l'acceptation faite par le notaire.—Le transport d'une créance enregistrée est parfait par l'acceptation du débiteur et l'enregistrement subséquent à l'acceptation ; et il n'est pas nécessaire, lorsqu'il y a acceptation du débiteur, de lui fournir un double du certificat de l'enregistrement.—C. R.—*Crébassa vs Crépeau*, 1 R. L., p. 667.

18. Le débiteur qui a accepté la signification d'un transport n'est plus recevable à plaider erreur quant au montant dû par lui au cédant.—C. R.—*Macdonald vs Goyette*, 2 R. L., p. 185.

19. Senécal, to whose insolvent estate Sauvageau was assignee on the 10th August 1866, transferred to Gauthier certain sums of money owing to him a year before he become insolvent and made an assignment, and the transfers above mentioned were only served on the debtors a few days prior thereto. On action by Gauthier against debtors, Sauvageau intervened, and Gauthier's action was dismissed in the court below (Arthabaska). Judgment reversed by the Court of Queen's Bench, which held that the creditors of the vendor are not, in the absence of fraud or simulation, *tiers*, in the sense of the art. 1571 C. C.; that the notification of the transfer under the circumstances was valid, and would have been valid even had the transfers been served "*après la faillite notoirement connue et déclarée.*"—Q. B.—*Gauthier & Sauvageau*, 1 R. C., p. 248.

20. Il est nécesaire de signifier au débiteur copie de l'acte de signification en même temps que la copie de l'acte de transport.—TORRANCE J.—*McLennan vs Martin*, 3 R. L., p. 31.

21. Une quittance sous seing privé donné par un cédant à son débiteur, est une exception valable et une réponse suffisante à l'action d'un cessionnaire qui n'a pas signifié son transport, s'il n'y a pas eu fraude.—Q. B.—*In re Leduc*, M. C. R., p. 96.

22. It is the duty of the creditor to effect a signification of the transfer.—Q. B.—*Dorion & Doutre*, 3 L. C. L. J., p. 119.

23. Le cessionnaire d'une créance, par transport non signifié au débiteur, peut poursuivre ce dernier, et la signification de l'action équivaut à la signification du transport.—SICOTTE, J.—*Lamoureux vs Renaud*, 3 R. L., p. 39.

24. Il n'y a pas lieu à l'action hypothécaire, sur un transport qui n'a pas été signifié au débiteur originaire.—C. R.—*Pacaud vs Provencher*, 3 R. L., p. 454.

25. Qu'un cessionnaire n'a pas droit d'action tant que le transport n'a pas été signifié et qu'il n'en a pas été délivré copie au débiteur, à moins que le cessionnaire ne justifie de l'acceptation du transport, acceptation qui équivaut à signification.—Q. B.—*Charlebois & Forsyth*, 14 L. C. J.,p. 135.

26. Le transport d'une créance hypothécaire donne au cessionnaire la possession utile de la dette, par l'enregistrement du transport avec signification d'une copie enregistrée au tiers détenteur.—Q. B.—*Pacaud & Beauchêne*, 17 L. C. J., p. 70.

27. A memorandum *sous seing privé*, by which a printing corporation, authorized W. (its president) to collect a debt due to the corporation, the memorandum stating that such account had been transferred to him for value received, could not be considered a transfer to a banking corporation of which W. was also president, though the course of dealing indicated that such was the intention of the parties. Even if such memorandum could be considered a transfer to the banking corporation, the latter, not having used diligence to collect the debt,

Digitized by Google

and there having been no signification upon the debtor, had no claim against a subsequent transferee buying in ignorance of such alleged previous transfer, by notarial deed duly signified, and acted upon by the debtor by payment of the debt to such subsequent transferee.—Q. B.—*Bank of Montreal & White*, 17 L. C. J., p. 335.

28. Le requérant en nullité de décret, cessionnaire d'un créancier, doit avant de faire sa requête, faire signifier son transport au défendeur ou le lui faire accepter, pour créer un lien de droit entre lui et le défendeur ; mais il n'est pas nécessaire que ce transport soit signifié aux adjudicataires.—ROUTHIER, J.—*Lépine vs Barrette*, 5 R. L., p. 703.

29. The article C. C. 1571 does not apply to an action founded on a transfer without signification, where the only plea is that the defendant is not proprietor (C. C. P. 144.)—TORRANCE, J.—*Gibeau vs Dupuis*, 18 L. C. J., p. 101.

30. Dans une action personnelle par un cessionnaire, sur son transport, il ne lui est pas nécessaire d'alléguer qu'il a signifié au défendeur un double de l'enregistrement requis par l'article 2127 du Code Civil, et l'allégation de la signification requise par l'article 1571 C. C., lui est suffisante.—TASCHEREAU, J.—*Dumont vs Laforge*, 1 Q. L. R., p. 159.

31. Non-signification of transfer of the claim sued on must be pleaded ; and therefore where the defendant allowed judgment to be obtained *ex parte* it was held that he could not raise the question of non-signification in appeal.—Q. B.—*Stanley & Honlon*, 21 L. C. J., p. 75.

32. Le créancier n'a pas droit d'action contre son débiteur pour une créance qui se trouve transportée par un jugement sur tiers-saisie.—Q. B.—*Théberge & Fournier*, 8 R. L., p. 390.

33. The plaintiff brought action for a debt due to a firm of Tate & Co., of which he had been a partner. By the deed of dissolution it was agreed that the business of the firm should be carried on by plaintiff and Charles Tate, to whom the retiring partner, Grant, transferred his rights. Charles Tate died and his rights were represented by the plaintiff.—*Held*, that it was not necessary that the deed of dissolution by which Grant transferred his rights to the other partners, should be signified to defendants before suit, such deed of dissolution of partnership and transfer not falling within the category of transfers or sales of debts or rights of action, which must be signified before action brought against third parties.—TASCHEREAU, J.—*Tate vs Torrance*, 1 L. N., p. 52, 22 L. C. J., p. 48.

34. A *cédant*, although his transfer has not been served on the debtor, has no action, the *cessionnaire* only having the right to sue and recover the amount of the transfer.—C. R.—*Berthelet vs Théoret*, 1 L. N., p. 387.

35. Although an heir has sold all his rights in the succession of his father to a third party, and has caused the deed of sale to be duly registered, but the transfer has not been signified, he must sue afterwards in his own name in the interest of the third party who has acquired such rights, such third party having no action in his own name.—SICOTTE, J.—*Sauvé vs Sauvé*, 1 L. N., p. 387.

36. But it was held in the Court of Review that a deed of sale or cession of *droit de succession* duly enregistered, does not require signification, an *acte sous seing privé* subsequently passed between the parties, purporting to annul and set aside the deed of cession, but which *acte sous seing privé* has been neither registered nor signified, does not give the *cédant* a right of action.—C. R.—*Sauvé vs Sauvé*, 1 L. N., p. 546.

Digitized by Google

37. Qu'un transport d'une créance hypothécaire qui a été enrégistré est valablement signifié par l'action du cessionnaire.—C. R.—*No name*, 10 R. L., p. 200.

38. Que l'adjudicataire de créances à lui vendues par un syndic à une faillite, devra pour obtenir jugement en vertu de cette vente, produire l'autorisation des créanciers au syndic officiel de faire ce transport de créance, et que la déclaration dans l'acte de vente ou transport faite par le syndic lui-même qu'il est autosisé n'est pas suffisante.—Q. B.—*Tourville vs Patrick*, 11 R. L, pp. 442 & 534.

39. When a person contracted with a number of farmers to build a cheese factory, on condition that they should give him all their milk to be made into cheese, for a period of twenty years and he subsequently sold his business to a third party, transfering to him his privileges, whereupon the farmers ceased to bring the transferee their milk, it was held that, although there was no signification and acceptance of the transfer, yet the farmers were bound by it.—ANGERS, J.—*Bernatchez vs Beaumont*, 13 R. L., p. 281.

40. Que l'acceptation faite par le débiteur d'un transport d'une créance par lui due, ne l'oblige pas à payer au cessionnaire plus qu'il ne devait au cédant, et que l'acceptation n'équivaut qu'à une signification de transport.—MATHIEU, J.—*Dorion vs Ouimet*, 13 R. L., p. 381.

41. Que dans le cas d'une convention par laquelle un certain nombre de personnes s'engagent, pour une période de vingt années à ne pas envoyer le lait de leurs vaches à d'autre fromagerie que celle de la personne envers qui elles s'obligent (cette dernière s'engageant de son côté à manufacturer en fromage, moyennant 20 p. c. et sous responsabilité pour le fromage qu'elle gâterait, tout le lait que les personnes lui enverraient), ne constitue pas une société entre les parties, mais un simple contrat de louage qui ne crée que des obligations personnelles, et que dans ce cas, le propriétaire de telle fromagerie qu'il a cédée, y inclus tous les droits que lui conférait le dit acte, n'a pu créer aucun lien de droit entre le cessionnaire et les autres parties à la convention, et qu'il n'y a pas lieu pour le cessionnaire à aucune action contre les dites parties pour l'inexécution des obligations qu'elles ont contractées par le dit acte.—Q B.—*Beaubien & Bernatchez*, 14 R. L., p. 193.

42. Des créances non échues, notamment des loyers, sont susceptibles d'être données en nantissement et que la cession d'une créance non encore échue confère un privilège que le cessionnaire pourra invoquer, lors de l'échéance, à l'encontre de tout créancier arrêtant subséquent.—MATHIEU, J.—*DeBellefeuille vs Ross*, 29 L. C. J., p. 145, M. L. R., 1 S. C., p. 212.

43. A non-negotiable note, endorsed by payer in full and transferred to a third party, may be collected by the latter in his own name from the maker, if signification of the transfer be duly made upon him and such signification of transfer need not be in authentic form, but may be *sous seing privé*.—C. R.—*McCorkill vs Barrabé*, M. L. R., 1 S. C., p. 319.

44. That service of an action by the transferer of a debt, setting up the transfer, is equivalent to signification of the transfer.—DOHERTY, J.—*Nicholson vs Prowse*, M. L. R., 3 S. C., p. 189.

45. That an attorney to whom distraction of costs has been awarded, is the personal creditor for such costs, and if his client pays them and obtains a transfer, the transfer must be served upon the debtor before an action can be brought therefor.—DAVIDSON, J.—*Bury vs Corriveau Silk Mills Co.*, M. L. R., 3 S. C., p. 218.

Digitized by Google

1572. If before the signification of the act by one of the parties to the debtor he have paid to the seller, he is discharged.—Pothier, *Vente*, 555 ; 2 Troplong, *Vente*, 901 ; C. N., 1691. [II. 67.]

Amendments :—See amendments noted at C. C. 1570 and 1571.

DECISION :—One Dulac, being indebted to the Appellant, procured for him from one Fortier an obligation in terms as if Fortier were personally the debtor of the Appellant. Dulac paid the Appellant and received from him the obligation and then Dulac transferred it to the Respondent.—*Held*, that Respondent had no action against Appellant for the amount of the transfer, even if he obtained it for value, his action, if any he had, being against Fortier or Dulac.—Q. B.—*Roy & Lepage*, 11 Q. L. R., p. 204.

1573. The two last preceding articles do not apply to bills, notes or bank checks payable to order or to bearer, no signification of the transfer of them being necessary ; nor to debentures for the payment of money , nor to transfers of shares in the capital stock of incorporated companies, which are regulated by the respective acts of incorporation or the by-laws of such companies.

Notes for the delivery of grain or other things, or for the payment of money, and payable to order or to bearer, may be transferred by endorsement or delivery, without notice, whether they are payable absolutely or subject to a condition. [II. 67.]

DECISIONS :—1. A., the holder of a receipt, by which B. declared he held in trust for A. two hundred tons of coal and would sell the same accounting for the proceeds and acknowledging himself to be bailee of said coal for A., cannot transfer the said receipt without endorsement.—C. R.—*Baile vs Whyte*, 13 L. C. J., p. 130.

2. Sailors advance notes, although conditional in their terms, can be transferred by endorsement, when made to order, and by delivery, when payable to bearer, but not being a bill of exchange or a promissory note, it has not the privilege that C. C. 2287 gives such documents, and the *cessionnaire*, even before maturity, only acquires the rights of the payee.—Casault, J.—*Duchaine vs Maguire*, 8 Q. L. R., p. 295.

3. Que le cessionnaire d'actions dans une Société de Construction, qui lui ont été transportées pour les retirer lorsqu'elles deviendraient dues et payables, afin de garder sur ce montant certaines sommes de deniers par lui prêtées au cédant, avec convention de remettre au dit cédant la balance, lorsqu'il serait payé de son dû, devient le créancier et propriétaire de ces parts, nonobstant tout ce qu'il (le cessionnaire) pourrait devoir au cédant pour d'autres raisons.—Q. B.—*Gauthier & Roy*, 10 R. L., p. 443.

1574. The sale of a debt or other right includes its accessories such as securities, privileges and hypothecs.—C. C. 1024, 1499 ; C. N., 1692, 1615. [II. 67.]

DECISIONS :—1. The assignee of a debt has the right to intervene on the

Digitized by Google

seizure of an immoveable property of the debtor made in the name of the assignor before notification of the assignment for the benefit of the assignee and also to be declared proprietor of the debt and *dominus litis*, in the proceedings.—The assignor has no right to contest such a demand nor to claim to be first reimbursed the costs by him incurred as well in the suit as upon the seizure.—In the case submitted, the deed between the Appellant and the Respondent is an assignment which has made the Appellant proprietor of the debt.—Q. B.—*Berthelot & Guy*, 8 L. C. R., p. 305.

2. The assignee has the right of using the name of his assignor and to bring suit in the name of such assignor.—STUART, J.—*Cremazie vs Cauchon*, 16 L. C. R., p. 482.

3. That a promissory note given in payment of the price of an immoveable and secured by hypothec on such immoveable, may be transferred without signification and such transfer will include the hypothec as an accessory of the debt.—That the transferee of such note, after fruitless discussion of the maker and endorsers, may take an hypothecary action against the holder of the property.—Q. B.—*Quebec Bank & Bergeron*, 11 Q. L. R., p. 368, 14 R. L., p. 170. —C. R.—11 Q. L. R., p. 88.

1575. Arrears of interest accrued before the sale are not included in it as an accessory of the debt—Ancien Den., vo., *Accessoires*, n. 4; Guyot Rép., vo. *Accessoires*, p. 108; *Contrà* Troplong, *Vente*, n. 915; 6 Duranton, n. 507; Duvergier, n. 221; 6 Marcadé, p. 634. [II. 67.]

1576. The seller of a debt or other right is bound by law to the warranty that it exists and is due to him, although the sale be without warranty. Subject nevertheless to the exception declared in article 1510.—*ff* L. 6, *De evict*; Pothier, *Vente*, 559; Tropl., *Vente*, 931-5-6; Loyseau, *Garantie des rentes*, c. 3, n. 11 *in fine*; 1 Bourjon, 467, nn. 19, 20; C. N., 1693. [II. 69.]

DECISION:—La garantie de faits et promesses stipulée dans un transport, entraine la garantie de l'existence de la dette prescrite dès avant la date du transport.—COURT OF APPEALS.—*Donegani & Choquette*, 2 R. de L., p. 301.

1577. When the seller by a simple clause of warranty obliges himself for the solvency of the debtor, the warranty applies only to his solvency at the time of sale, and is limited in amount to the price paid by the buyer.—*ff* L. 74 *De evict*; Loyseau, *loc. cit.*, c. 7, nn. 7, 8; Pothier, *Vente*, 570; 1 Bourjon, p. 467, nn. 21 et seq; Lamoignon, tit. 22, art. 10 et seq; 2 Tropl., *Vente*, 938 et seq., 948; C. N., 1694, 1695. [II. 69.

DECISIONS:—1. That under the clause of *garantir, fournir et faire valoir* in a deed of transfer of a debt, the assignee cannot sue the assignor, without

Digitized by Google

previously discussing the debtor and establishing his insolvency.—DORION, J.—*Homier vs Brosseau*, 22 L. C. J., p. 135.

2. Que le cessionnaire d'une créance ne peut poursuivre le cédant qui lui a transporté cette créance avec garantie de fournir et faire valoir, sans avoir au préalable discuté les biens du débiteur ou établi légalement sa complète insolvabilité.—Que l'insolvabilité complète ne peut être prouvée par témoins.—C. R.—*Labelle vs Sayer*, 10 R. L., p. 545.

3. Que la promesse de garantir, de fournir et faire valoir rend le cédant garant de l'insolvabilité présente du débiteur et de celle qui peut arriver dans la suite, mais le cessionnaire ne peut exercer son recours contre son cédant qu'après avoir discuté les biens du débiteur et prouvé son insolvabilité.—CHAGNON, J.—*Bédard vs Rémillard*, 28 L. C. J., p. 64.

1578. The preceding articles of this chapter apply equally to transfers of debts and rights of action against third persons by contracts other than sales, except gifts to which article 1576 does not apply.—Lacombe, vo. *Eviction*, n. 26; Loyseau, *Rentes*, c. 1, n. 14; Ricard, *Donations*, part. 1, n. 954. [II. 69.]

SECTION II.—OF THE SALE OF SUCCESSIONS.

1579. [He who sells a right of succession without specifying in detail the property of which it consists is bound by law to warrant only his right as heir.]—C. N., 1696. [II. 69.]

1580. If the seller have received the fruits or revenues of any property, or the amount of any debt, or sold any thing making part, of the succession, he is bound to reimburse the same to the buyer, unless they have been expressly reserved.—*ff* L. 2, §§ 1, 3, *De hæred. vend*; Cod., L. 5, *De hæred. vend*; Pothier, *Vente*, nn. 530, 531, 532, 534, 536, 537; 2 Troplong, 963; C. N., 1697. [II. 69.]

1581. The buyer, besides his obligations common to the contract of sale, is obliged to reimburse the seller for all debts and expenses of the succession paid by him, to pay him the debts which the succession may owe him, and to discharge all debts and obligations of the succession for which he is liable; unless there is a stipulation to the contrary.—*ff* L. 2, §§ 16, 17, 18, *De hæred. vend.*; Pothier, *Vente*, 540-1-2, *Succes.*, c. 5, art. 2, § 2; 2 Troplong, *Vente*, 976-7; C. N., 1698. [II. 69.]

Digitized by Google

SECTION III—OF THE SALE OF LITIGIOUS RIGHTS.

1582. When a litigious right is sold, he against whom it is claimed is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer has paid it.—Cod., L. 22, L. 23, L. 24, *Mandati vel Contrà* ; Pothier, *Vente*, 590 ; N. Den., *Cession de droits litigieux* ; 2 Troplong, *Vente*, 985 ; C. N., 1699. [II. 69.]

DECISIONS:—1. A transfer of a litigious right, made on condition that the assignee shall bear the costs and share in the amount to be recovered, is void, as being against law and public policy, and the assignee cannot maintain an action on such a transfer.—Q. B.—*Power & Phelan*, 4 Q. B. R., p. 57.

2. Where an action brought by a transferee was dismissed on the ground that the consideration of the transfer was champertous, the transferor regained his rights and might institute the action in his own name.—LORANGER, J.—*Higgins vs Power*, M. L. R., 1 S. C., p. 268.

3. Que le retrait de la dette litigieuse dont l'existence est niée ne peut pas être proposé par des conclusions subsidiaires pour le cas où la demande serait prouvée, ni par le débiteur qui a contesté jusqu'au bout; que le défendeur, tant qu'il conteste ne peut pas user de ce droit et que, pour demander le retrait, il doit cesser de défendre.—CASAULT, J.—*Weil vs Gagnon*, 13 Q. L. R., p. 357.

1583. A right is held to be litigious when it is uncertain, and disputed or disputable by the debtor, whether an action for its recovery is actually pending or is likely to become necessary.—Cod., L. 1, *In authent. de litigiosis ;* Pothier, *Vente*, 583 ; N. Den., *loc. cit. ;* 2 Troplong, *Vente*, n. 986 ; 6 Marcadé, p. 351 ; *Contrà*, 2 Duvergier, n. 350, pp. 444-5 ; C. N., 1700. [II. 71.]

DECISIONS:—1. Un droit ne peut être considéré comme litigieux que quand il y a procès mû.—BERTHELOT, J.—*Leclerc vs Beaudry*, 10 L. C. J., p. 20.

2. Que l'achat d'une dette qui a été payée, mais dont il n'y a pas de quittance est, pour l'acquéreur, qui a été informé du paiement, celui d'une dette litigieuse.—Que la preuve testimoniale suffit, même pour une dette excédant $50, pour en déterminer le caractère litigieux.—C. R.—*Coté vs Haughey*, 7 Q. L. R., p. 142.

3. An instance held by the Court to be "*droit litigieux.*"—Q. B.—*Dansereau & Létourneux*, M. L. R., 1 Q. B., p. 362.

4. Que dans l'espèce actuelle, le droit d'action de l'appelant ne découlant pas du prétendu contrat de "*champerty*" entre l'appelant et un tiers, son beau-frère, il n'y a pas lieu d'absoudre l'intimée de l'obligation de réparer le tort causé à l'appelant, résultant du quasi-délit commis par l'intimée.—Q. B.—*Dussault & Compagnie du Chemin de Fer du Nord*, 12 Q. L. R., p. 50.

1584. The provisions contained in article 1582 do not apply ;

1. When the sale has been made to a co-heir or co-proprietor of the right sold ;

Digitized by Google

2. When it has been made to a creditor in payment of what is due to him ;

3. When it has been made to the possessor of a property subject to the litigious right ;

4. When the judgment of a court has been rendered affirming the right, or when it has been made clear by evidence and is ready for judgment.—Cod., L. 22, L. 23, L. 24, *loc. cit.* ; Pothier, *Vente*, 593-7 ; Lebrun, *Success.*, liv. 4, ch. 2, sec. 5, n. 68 ; N. Den., *loc. cit.*, § 2, n. 4 ; 2 Troplong, *Vente*, 998-9, 1005 et seq ; 6 Marcadé, 355-6, n. 3 ; 2 Duvergier, 377-8 ; C. N., 1701. [II. 71.]

DECISION :—That C. C. 1584 § 4, which states that "the provisions of C. C. "1582, do not apply when the judgment of a court has been rendered affirming the "right," refers to a judgment upon the particular demand in litigation and not to a judgment affirming another right of a similar character.—Q. B.—*Brady & Stewart*, M. L. R., 2 Q. B., p. 272.—Confirmed by the SUPREME COURT.—10 L. N., p. 324.

CHAPTER ELEVENTH.

OF FORCED SALES AND TRANSFERS RESEMBLING SALE.

SECTION I.—OF FORCED SALES.

1585. The creditor who has a judgment against his debtor may take in execution and cause to be sold, in satisfaction of such judgment, the property moveable or immoveable of his debtor, except only the articles specially exempted by law ; subject to the rules and formalities provided in the Code of Civil Procedure.—C. S. L. C., c.85, ss. 1, 2, 3. C. C. P. 545 et seq. [II. 71.]

1586. In judicial sales under execution, the buyer, in case of eviction, may recover from the debtor the price paid with interest and the incidental expenses of the title ; he may also recover, from the creditors who have received it, the price with interest ; saving to the latter their exception of discussion of the property of the debtor. —*ff* L. 74, § 1, *De evict* ; 2 Pigeau, 254 ; 13 Duranton, n. 686 ; 16 *Ibid.*, n. 265 ; Voet *ad Pand., De evict.*, n. 5 ; Pothier, *Procéd.*, p. 254 ; Troplong, *Vente*, 432, 522 ; 6 Marcadé, p. 256 ; C. L., 2599. [II. 71.]

DECISIONS :—1. In November, 1853, the Plaintiff became *adjudicataire*, for £1100.0.0, of a Fief sold at a Sheriff's sale on a suit of La Banque du Peuple *vs* Donegani. The proceeds of the sale were ordered by judgment of distribution to

Digitized by Google

be paid to the Bank, opposant in the case. By a survey made by the *adjudicataire* on the 15th January, 1857, it appeared that the property described as containing 400 arpents, only contained 188 arpents. On the 15th September, 1857, the *adjudicataire* brought his action to recover from the Bank £583.0.0, bring the proportional deduction for the deficiency (*défaut de contenance.*) It was held that the action was brought within a reasonable delay, notwithstanding Donegani's insolvency and that the Bank had, on the 27th. March, 1857, recovered £4053.13.0 from Quesnel, *cessionnaire* of Donegani, as the balance of the debt due by Donegani to the Bank and recognized and accepted the transfer of 392 shares of stock in the said Bank held in Donegani's name, which shares by the terms of the Act of incorporation Donegani could not have transferred without first paying all he owed. to the Bank.—That the Defendant in the previous action (Donegani) need not be put *en cause.*—That the *adjudicataire* having, through error as to the true extent of the property, paid the full price of his adjudication and the Bank having, as an opposant in the case, received the same, was bound to refund the excess Q. B.—*Dexjardins & Banque du Peuple,* 10 L. C. R., p. 325.

2. An *adjudicataire* at sheriff's sale of real estate sold under the provisions of the Code of Civil Procedure of Lower Canada, cannot legally claim to be refunded, by way of collocation on the proceeds of the sale, a portion of the price paid, on the ground that the property proved to be of considerably less extent than advertised, in consequence of an adjoining property having been erroneously included in the description.—Under any circumstances the knowledge by the *adjudicataire,* at the time he bid, that the adjoining property did not belong to the defendants, and was included in the description by error, would be a complete bar to such claim.—Q. B.—*Melançon vs Hamilton,* 16 L. C. J., p. 57.

3. The obligation of the *garant formel,* is not extinguished by a *décret,* which does not purge the *charge,* even where the *acquéreur* becomes *adjudicataire* under the *décret.*—Q. B.—*Soulard & Letourneau,* 19 L. C. J., p. 40.

1587. The last preceding article is without prejudice to the recourse which the buyer has against the prosecuting creditor, by reason of informalities in the proceedings, or of the seizure of property not ostensibly belonging to the debtor.—[II. 71.]

1588. The general rules concerning the effect of forced judicial sales in the extinction of hypothecs and of other rights and incumbrances, are declared in the title *Of Privileges and Hypothecs,* and in the Code of Civil Procedure.—C. C. P. 710. [II. 71.]

1589. In cases in which immoveable property is required for purposes of public utility, the owner may be forced to sell it or be expropriated by the authority of law in the manner and according to the rules prescribed by special laws.—Pothier, *Vente,* 511-2-3-4; Ord. de 1303; Louet et Brodeau, lettre E, art. 1, 2; C. L., 2604 et seq; C. S. L. C. c. 70, s. 26 et seq., ss. 42, 43, c. 24, s. 50. [II. 71.]

Digitized by Google

1590. In the case of sales and expropriations for purposes of public utility, the party acquiring the property cannot be evicted. The hypothecs and other charges are extinguished, saving to the creditors their recourse upon the price and subject to the special laws relating to the matter.—Pothier, *Vente*, 513 ; C. S. L. C., *ibid.*, sec. 43. [II. 73.]

1591. The rules concerning the formalities and proceedings in judicial and other forced sales and expropriations are contained in the Code of Civil Procedure and in the acts relating to municipal and other incorporated bodies ; such sales and expropriations are subject to the rules generally applicable to the contract of sale, when these are not inconsistent with special laws or any article of this code.—[II. 73.]

SECTION II.—OF THE GIVING IN PAYMENT.

1592. The giving of a thing in payment is equivalent to a sale of it, and makes the party giving liable to the same warranty.

The giving in payment, nevertheless, is perfected only by the actual delivery of the thing. It is subject to the provisions relating to the avoidance of contracts and payments contained in the title *Of Obligations*.—C. C. 1032 et seq ; Cod., L. 4, *De evict* ; Pothier, *Vente*, 600 et seq., 604, 605 ; 1 Troplong, *Vente*, n. 7 ; 1 Duvergier, n. 45 ; Championnière et Rigaud, Droits d'Enreg., vo. *Dation ;* 1 Pardessus, *Droit Com.*, n. 203 ; C. L., 2625 et seq. [II. 73.]

DECISION:—Que la délivrance n'est requise dans la dation en paiement, que pour empêcher qu'un tiers puisse acquérir la chose cédée au préjudice du créancier cessionnaire.—Que l'obligation naturelle et la simple obligation morale suffisent pour faire de la donation un contrat onéreux qui n'est pas, pour sa validité, soumis aux formes requises pour la donation entrevifs.—C. R.—*Drouin vs Provencher*, 9 Q. L R., p. 179.

SECTION III.—OF ALIENATION FOR RENT.

1593. The alienation in perpetuity of immoveable property for an annual rent, is equivalent to a sale. It is subject to the same rules as the contract of sale in so far as they can be made to apply.—Pothier, *Bail à rente*, ch. 1. [II. 73.]

Digitized by Google

1594. The rent may be payable either in money or in kind. Its nature and the rules to which it is subject are declared in the articles relating to rents contained in the second chapter of the first title of the second book.—Pothier, *Bail à Rente*, n. 13 ; C. S. L. C., c. 51, sec. 5. [II. 73.]

1595. The obligation to pay the rent is a personal liability ; the purchaser is not discharged from it by abandonment of the property, nor is he discharged by reason of the destruction of the property by a fortuitous event or by irresistible force.—C. S. L. C., c. 51 [II. 73.]

DECISION :—A party who contracts to pay a ground rent for ever (*à perpétuité*) deprives himself of the power of making a *déguerpissement*.—The stipulation *de payer la rente à toujours et à perpétuité* is equivalent to the obligation *de fournir et faire valoir*.—Q. B.—*Hall & Dubois*, 8 L. C. R., p. 361.

TITLE SIXTH.

OF EXCHANGE.

1596. Exchange is a contract by which the parties respectively give to each other one thing for another.

[It is effected by consent, in the same manner as sale.]—*ff* L. 1, *De contr. empt.* ; L. 1, §§ 1, 2, *De rerum permut.* ; Pothier, *Vente*, 617, 621 ; C. N., 1702, 1703. [II. 73.]

DECISION :—La garantie résultant d'un acte d'échange ne confère aucun droit d'hypothèque s'il n'y a eu une somme stipulée pour déterminer le montant de telle garantie.—SMITH, J.—*Casavant vs Lemieux*, 2 L. C. J., p. 139.

1597. If one of the parties, even after having received the thing given to him in exchange, prove that the other party was not owner of such thing, he cannot be compelled to deliver that which he has promised in counter-exchange, but only to return the thing which he has received.—*ff* L. 1, §§ 1, 2, *De rerum permutatione* ; Pothier, *Vente*, 621 ; C. N., 1704. [II. 75.]

Digitized by Google

1598. The party who is evicted of the thing he has received in exchange has the option of demanding damages or of recovering the thing given by him.—*ff loc. cit.*, §§ 3, 4; Pothier, *Vente*, 623; C. N., 1705. [II. 75.]

1599. The rules contained in the title *Of Sale* apply equally to exchange, when not inconsistent with any article of this title.—Pothier, *Vente*, 624; C. N., 1707. [II. 75.]

END OF VOL. ONE.

Digitized by Google

APPENDIX.

5770. Article 2 shall read as follows :

"**2.** The acts of the Legislature are deemed to be promulgated :

1. If they be assented to by the Lieutenant-Governor, from the date of such assent ;

2. If they be reserved, from the time at which the Lieutenant-Governor makes known, either by proclamation or by speech or message to the Legislative Council and Assembly, that they have received the assent of the Governor General in Council.

If, however, they have not been reserved, and unless another time has been fixed, they come into force only on the sixtieth day after they have been sanctioned ; and if they have been reserved and afterwards assented to, then on the tenth day after their publication in the Quebec Official Gazette." C. C., 2 ; B. N. A. Act., 1867, ss. 57, and 90 ; 31 V., c. 6, s. 2 ; 35 V., c. 4, ss. 1 and 2 ; 49-50 V., c. 95, s. 5.

5771. Article 3 shall read as follows :

"**3.** Any provincial act assented to by the Lieutenant-Governor ceases to have force and effect from the time at which it is announced, either by proclamation or by speech or message to the Legislative Council and Assembly, that such act has been disallowed, within the year following the reception by the Governor-General of the authentic copy which has been transmitted to him of such act." C. C., 3 ; B. N. A. Act., 1867, ss. 56 and 90 ; 49-50 V., c. 95, s. 6.

5772. Article 4 shall read as follows :

"**4.** An authentic copy, in French and English, of the statutes assented to by the Lieutenant-Governor, or the assent to which has been published as required by article 2, if a reserved act, is furnished by the Clerk of the Legislature to the Queen's printer, whose duty it is to print the number of copies indicated to him by the Lieutenant-

Digitized by Google

Governor in Council and distribute them to those persons designated by orders in council and to the members of the Legislative Council and Legislative Assembly according to the joint resolution of the two Houses." C. C., 4; 31 V., c. 6, ss. 4, 5, 7 and 8; 49-50 V., c. 95, ss. 44, 47, 50 and 51.

5773. Article 5 shall read as follows:

"**5.** The persons entitled to such distribution are: the members of both Houses of the Legislature, and the public departments, administrative bodies, judges, public officers and other persons, mentioned in the orders in council of the Lieutenant-Governor." C. C. 5; 31 V. c. 6, ss. 8 and 10; 49-50 V., c. 95, ss. 51 and 53.

5774. Article 10 shall read as follows:

"**10.** Every act is public unless declared to be private.

All persons are bound to take cognizance of public acts; but private acts must be pleaded." C. C., 10; 31 V., c. 7, s. 6; 49-50 V., c. 95, s. 35.

5775. Article 17 shall read as follows:

"**17.** The words, terms, expressions and enactments, enumerated in the following schedule whenever used in this Code or in any act of the Provincial Legislature, have the meaning and application respectively assigned to them in such schedule, and are interpreted in the manner therein specified, unless there is some special enactment to the contrary." C. C. 17; 31 V., c. 7, s. 2 § 1; 49-50 V., c. 95, s. 36.

SCHEDULE.

1. Each of the expressions "Her Majesty," "the King," "the Sovereign," "the Queen," "the Crown," means the King or the Queen, his or her heirs and successors, Sovereigns of the United Kingdom of Great Britain and Ireland. C. C., 17., § 1.

2. The words "Imperial Parliament" mean the Parliament of the United Kingdom of Great Britain and Ireland; the words "Federal Parliament" mean the Parliament of the Dominion of Canada; the word "Legislature" means the Legislature of Quebec; the words "Imperial acts or statutes" mean the laws passed by the Imperial Parliament; the words "Federal acts or statutes" mean the laws passed by the Parliament of Canada; the words "act," "statute" or

Digitized by Google

"law" used without qualification mean the acts, statutes and laws of the Legislature of Quebec; the word "Province," when used alone, means the Province of Quebec, and the qualification "provincial," added to the words "act," "statute" or "law," means the acts, statutes or laws of the Province. C. C. 17, § 2 ; 31 V., c. 7, s. 2 §§ 2, 3, 9 and 10; 49-50 V., c. 95, s. 36 §§ 7, 8 and 10.

3. The words "Governor-General" mean the Governor General of Canada or the person administering the Government of Canada ; and "Lieutenant-Governor" the Lieutenant-Governor of the Province of Quebec, or the person administering the Government of the Province. C. C., 17, § 3 ; 31 V., c. 7, s. 2 § § 4 and 5 ; 49-50 V., c. 95, s. 36 § 2.

4. The words "Governor-General in Council" mean the Governor-General or person administering the Government acting with the advice of the Queen's Privy Council for Canada ; and "Lieutenant-Governor in Council," the Lieutenant-Governor or person administering the Government acting with the advice of the Executive Council of the Province of Quebec. C. C., 17 § 4 ; B. N. A., Act, 1867, ss. 11, 12, 13, 14, 66 and 67 ; 31 V., c. 7, s. 2 § 6 ; 49-50 V., c. 95, s. 36 § 3.

5. The word "proclamation" means proclamation under the Great Seal, and the words "Great Seal" mean the Great Seal of the Province of Quebec. C. C., 17 § 5 ; 31 V., c. 7, s. 2 § 1 ; 49-50 V., c. 95, s. 36 § 19.

6. The words "Canada," "Dominion," mean the Dominion of Canada ; the words "Lower Canada," mean all that part of Canada which formerly constituted the Province of Lower Canada, and mean now the Province of Quebec ; and the words "Upper Canada" mean that part of Canada which formerly constituted the Province of Upper Canada, and mean now the Province of Ontario. C. C., 17 § 6 ; B. N. A. Act, 1867, s. 6.

7. The words "United Kingdom" mean the United Kingdom of Great Britain and Ireland, and the "United States" the United States of America. C. C., 17 § 7.

8. The name, commonly given to a country, place, body, corporation, society, officer, functionary, person, party or thing, designates and means the country, place, body, corporation, society, officer, functionary, person, party or thing thus named, without the necessity of more ample description. C. C., 17 § 8.

9. The masculine gender includes both sexes, unless it appears by the context that it is only applicable to one of them. C. C., 17 § 9.

10 The singular number extends to more than one person, or

Digitized by Google

more than one thing of the same sort, whenever the context admits of such extension. C. C., 17 § 10.

11. The word "person" includes bodies politic and corporate, and extends to heirs and legal representatives, unless such meaning is contrary to law or inconsistent with the particular circumstances of the case. C. C., 17 § 11.

12. The words "writing," "manuscript" and terms of like import, include words printed, painted, engraved, lithographed or otherwise traced or copied. C. C., 17 § 12 ; 49-50 V., c. 95, s. 36 § 21.

13. The word "month" means a calendar month. C. C., 17 § 13 ; 31 V., c. 7, s. 2 § 1 ; 49-50 V., c. 95, s. 36 § 24.

14. By "holidays" are understood the following days :

1. Sundays ;

2. New Year's Day ;

3. The festivals of the Epiphany and the Annunciation, Ash Wednesday, Good Friday, Easter Monday, the Ascension, *Corpus Christi*, the festival of St. Peter and St. Paul, All Saints' Day, Conception, and Christmas Day ;

4. The anniversary of the birthday of the Sovereign, or the day fixed by proclamation for its celebration ;

5. The first day of July, (the anniversary of the day on which the British North America Act, 1867, came into force), or the second day of July, if the first be a Sunday, and

6. Any other day fixed by Royal proclamation or by proclamation of the Governor-General or of the Lieutenant-Governor, as a day of general fast or thanksgiving. C. C., 17 § 14 ; 31 V., c. 7, s. 2 §§ 1 and 25 ; 42-43 V., c. 19 s. 2 ; 49-50 V., c. 95, s. 36 § 23.

15. The word "oath" includes the solemn affirmation which certain persons are permitted to make instead of an oath. C. C., 17 § 15.

16. The word "magistrate," means a justice of the peace. "Two justices of the peace" mean two or more justices sitting or acting together.

When anything is ordered to be done by or before a justice of the peace, magistrate, functionary or public officer, one is understood whose powers or jurisdiction extend to the place where such thing ought to be done.

The authority given to do a thing carries with it all the powers necessary for that purpose. C. C., 17 § 16 ; 33 V., c. 12 § § 1 and 2.

17. The right of nominating to an office or employment carries with it that of removal. C. C., 17 § 17.

Digitized by Google

18. The duties imposed and the powers conferred upon an officer or public functionary, in his official capacity, pass to his successor, and pertain to his deputy in so far as they are compatible with the charge of the latter. C. C., 17 § 18.

19. When an act is to be performed by more than two persons, it may be validly done by the majority of them, except in the cases otherwise specially provided. C. C. 17 § 19.

20. The pound sterling is equivalent to the sum of four dollars eighty-six cents and two-thirds or one pound four shillings and four pence currency. The "sovereign" is of like value. C. C., 17 § 20.

21. The words "inhabitant of Lower Canada" or "inhabitant of the Province of Quebec" mean a person having his domicile in the Province of Quebec. C. C., 17 § 21; B. N. A. Act, 1867, s. 6.

22. The terms "acts of civil status" mean the entries made in the registers kept according to law, to establish births, marriages and burials.

"Registers of civil status" are the books so kept and in which such acts are entered.

"Officers of civil status" are those intrusted with the keeping of such registers. C. C., 17, § 22.

23. By "bankruptcy" is meant the condition of a trader who has discontinued his payments. C. C., 17 § 23.

24. A "fortuitous event" is one which is unforeseen, and caused by superior force which it was impossible to resist." C. C., 17 § 24.

5776. Article 26 shall read as follows:

"**26.** An alien cannot serve as a juror." B. N. A. Act, 1867, s. 92; 46 V., c. 16, s. 3.

5777. Article 42 shall read as follows:

"**42.** Acts of civil status are inscribed in two registers of the same tenor, kept for each Roman Catholic parish church, church, private chapel or mission, and for each Protestant church or congregation or other religious community, entitled by law to keep such registers, each of which is authentic, and has in law equal authority." C. C., 42; 36 V., c. 16, s. 1.

5778. The following articles are added after article 42:

"**42***a*. The duplicate registers for acts of civil status may be divided into three volumes, one for acts of births, one for acts of

Digitized by Google

marriage, and the third for acts of burial ; or into two volumes, one for acts of birth and of marriage, and the other for acts of burial.

Such volumes of the duplicate registers may be either blank, or may be prepared with printed forms, running consecutively through each volume ; but when one volume is used for acts of birth and of marriage, the first part shall contain, in consecutive order, the forms for acts of birth, and the last part, the forms for acts of marriage. 41 V., c. 8, s. 1.

42*b*. Whenever the duplicate registers are divided into volumes and are in printed forms, a sufficient number of blank pages shall be placed at the end of the volume for the certificates of death of persons whose bodies have been, before burial, delivered to a school of medicine or university for the purposes of the study of anatomy. 41 V., c. 8, s. 4 ; 46 V., c. 30, s. 9.

" **42***c*. An alphabetical index is made at the end of each duplicate of the registers of civil status for each church, congregation or other religious community, by the person entitled by law to keep such registers." 41 V., c. 8, s. 6.

5779. Article 44 shall read as follows :

" **44.** The registers are kept by the rector, curate, priest or minister having charge of the churches, congregations or religious communities, or by any other officer entitled so to do.

In the case of Roman Catholic churches, private chapels or missions they are kept by any priest authorized by competent ecclesiastical authority to celebrate marriages or administer baptism and perform the rites of burial." C. C., 44 ; 36 V., c. 16, s. 1.

5780. Article 45 shall read as follows :

" **45.** The duplicate register so kept, before it is used, must, at the instance of the party keeping it, be presented to one of the judges of the Superior Court or to the prothonotary of the district, or to a clerk of the Circuit Court in the county, to be by such judge, prothonotary or clerk, numbered and initialed in the manner prescribed by the Code of Civil Procedure.

In the case of Roman Catholic churches, private chapels or missions, the register must be granted under the name mentioned in the certificate of authorization by the bishop, the ordinary of the diocese,

Digitized by Google

the vicar general, or the admininistrator; and the priest on presenting the register for authentication must exhibit the certificate of authorization." C. C., 45; 32 V., c. 26, ss. 2 and 7; 36 V., c. 16, ss. 2, 5 and 9.

5781. Article 47 shall read as follows:

"**47.** Within the first six weeks of each year, the person who kept the said registers, or who has charge thereof deposits in the office of the prothonotary of the Superior Court of the district in which the registers were kept, one of the said duplicates.

Such delivery is acknowledged by a receipt which the prothonotary is bound to give, free of charge." C. C., 47; 32 V., c. 26, s. 3.

5782. Article 48 shall read as follows:

"**48.** Within six months after such deposit, each prothonotary is bound to verify the condition of the registers deposited in his office, and to draw up a summary report of such verification." C. C., 48; 32 V., c. 26, s. 4.

5783. Article 49 shall read as follows:

"**49.** The other duplicate register remains in the custody and possession of the priest, minister or other officer who kept the same, to be by him preserved and transmitted to his successor in office.

In the case of a Roman Catholic mission, such other duplicate is deposited by the priest in charge of such mission at the palace of the bishop of the diocese to which the mission belongs; and for the purpose of authenticating copies or extracts from any such register and for all other purposes connected therewith, the bishop or his secretary is deemed to be the depositary thereof." C. C., 49; 36 V., c. 16, ss. 3 and 5.

5784. The following article is added after article 53:

"**53*a*.** The father, or in case of his death or absence, the mother, of every child born, who has not caused such child to be baptized, or who, being of a creed other than Roman Catholic, has not caused the birth of such child to be registered by the persons authorized to keep a register of acts of civil status, is bound to cause the birth of such child to be registered, within four months from the date thereof, at the office of the secretary-treasurer or of the clerk of the municipality or city of his domicile, or else with the nearest justice of the peace; and the latter shall during the first two weeks

Digitized by Google

of the month of January in each year, make to the secretary-treasurer or to the clerk of the municipality or city a report of the births by him so registered.

The secretary-treasurer or clerk of the municipality or city shall each year during the month of January transmit a statement of such births to the office of the Provincial Secretary." 39 V., c. 20, ss. 7 and 8 ; 50 V., c. 7, s. 14.

5785. The following article is added after article 59 :

" **59***a*. In so far as regards the solemnization of marriage by Protestant ministers of the Gospel, marriage licenses are issued by the Department of the Provincial Secretary under the hand and seal of the Lieutenant-Governor, who for the purposes thereof is the competent authority under the preceding article.

The minister, who has performed any marriage ceremony under the authority of such license, is not subject to any action or liability for damages or otherwise, by reason of there being any legal impediment to the marriage, unless, at the time when he performed such ceremony, he was aware of the existence of such impediment." 35 V., c. 3, ss. 1, 2 and 6.

5786. The following article is added after article 66 :

" **66***a*. It belongs solely to the Roman Catholic ecclesiastical authority to designate the place in the cemetery, in which each individual of such faith shall be buried ; and if the deceased cannot, according to the canon rules and laws, in the judgment of the ordinary, be interred in ground consecrated by the liturgical prayers of such religion, he receives civil burial, in ground reserved for that purpose and adjacent to the cemetery." 39 V., c. 19, s. 1 ; 51-52 V., c. 48, s. 2.

5787. The following article is added after article 69 :

" **69***a*. The body of no person who died of a contagious disease shall be disinterred until after the expiration of five years from its interment or of such period as may be fixed by the Provincial Board of Health.

Subject to the preceding provision and by observing the formalities prescribed by the law respecting interments and disinterments, one or more bodies may be removed from any church, chapel or cemetery for the purpose of building, repairing or selling such

Digitized by Google

church, chapel or cemetery, or re-interring the bodies in another part of the same or in any other church, chapel or cemetery, or of rebuilding or repairing the tomb or coffin in which a body is buried." 51-52 V., c. 48, ss. 19 and 21.

5788. Article 210 shall read as follows:

" **210.** The separation renders the wife capable of suing and being sued, and of contracting alone for all that relates to the administration of her property; but for all acts and suits tending to alienate her immoveable property, she requires the authorization of her husband, or, upon his refusal, that of a judge." 39 V., c. 24, s. 1

5789. Article 304 shall read as follows:

" **304.** Actions belonging to a minor are brought in the name of his tutor.

Nevertheless, a minor of fourteen years of age may bring alone actions to recover his wages.

He may also, with the authority of a judge, bring alone all other actions arising from the contract for the hire of his personal services." 51-52 V., c. 22, s. 1.

5790. The following chapter is added after chapter second of title tenth of book first:

336*a*. May also be interdicted any habitual drunkard who squanders or mismanages his property or places his family in trouble or distress, or transacts his business prejudicially to his family, his friends or his creditors, or who uses intoxicating liquors to such an extent that he thereby incurs the danger of ruining his health or shortening his life. 33 V., c. 26 s. 1.

" **336***b*. The demand in interdiction is made by a petition, under oath, presented to any one of the judges of the Superior Court, who alone shall have power to act, by any relations, whether of blood or by affinity, or, in default of relations, by any friend of such habitual drunkard.

The judge may, for any of the reasons mentioned in the preceding article, set forth in the petition and established before him to his satisfaction, pronounce the interdiction of such habitual drunkard and appoint a curator to him, to manage his affairs, as in the case of one interdicted for prodigality. 33 V., c. 26, s. 1; 42-43 V., c. 28, s. 1.

Digitized by Google

336*c.* Any person who, according to the common report of the neighborhood, has the reputation of being a drunkard, is considered as being an habitual drunkard within the meaning of this chapter. 33 V., c. 26, s. 12.

" **336***d.* The petition praying for the interdiction of any habitual drunkard is personally served upon him at a time when he is sober, or, if at the time of the said service, the person whose interdiction is demanded is not sober, the petition is served upon a reasonable person of his family, at least eight days before that fixed for the appearance before the judge for the purpose of the interdiction." 33 V., c. 26, s. 5.

" **336***e.* The interdiction is proceeded with, by summoning before such judge a family council as in the case of tutorships, under the provisions of this Code, and by taking the opinion, under oath, of each person composing the family council, as to the truth of the fact of such person being an habitual drunkard and as to the necessity of such interdiction; but the person making such demand in interdiction cannot form part of such family council. 33 V., c. 26, s. 2.

" **336***f.* The person, whose interdiction is thus demanded, may produce before the judge witnesses to contradict the allegations of the petition and the evidence of any of the members of the family council; and each party may retain an advocate to conduct the proceedings on his behalf and to examine the witnesses before the judge, who may require, from the person instituting the demand in interdiction, further evidence of the facts alleged in the petition, in addition to that of the family council. 33 V., c. 26, s. 6.

" **336***g.* In proceeding to the interdiction, the proof is taken orally or in writing, in the discretion of the judge; and it is not necessary that the person, whom it is sought to interdict, be interrogated before the judge. 33 V., c. 26, ss. 4 and 6.

" **336***h.* The decision of the judge is final and without appeal, whether he grants the interdiction or rejects the demand therefor. 33 V., c. 26, s. 7.

" **336***i.* The judgment ordering the interdiction may also order, if it have been prayed for, that the person interdicted be confined in an establishment for habitual drunkards, for such space of time as may be deemed necessary. 47 V., c. 21, s. 2.

Digitized by Google

" **336***j*. Such order may, if not then obtained, be applied for and obtained subsequently upon sufficient proof, upon petition presented to one of the judges of the Superior Court in the district in which the interdicted person has his domicile, by observing the formalities prescribed in articles 336*d*, 336*e*, 336*f*, and 336*g*. 47 V., c. 21, s. 2.

" **336***k*. The judgment must mention the name of the establishment in which the person is to be confined, the duration of the confinement, the name or names of the persons who are to carry out the order, a certified copy whereof is given to the director of the establishment at the same time as the person is confided to his care. 47 V., c. 21, s. 2.

" **336***l*. The order for confinement may be suspended or cancelled at any time by one of the judges of the Superior Court, upon summary petition accompanied by sufficient proof that the person may, in his own interest and in that of his family, be released. 47 V., c. 21, s. 2.

" **336***m*. If any demand in interdiction under this chapter be rejected, the same shall not be renewed before the expiration of three months. 33 V., c. 26, s. 8.

" **336***n*. Any person interdicted as an habitual drunkard may be relieved from such interdiction, after one year's sober habits, and the removal thereof is effected by observing the same formalities as those prescribed to obtain the interdiction, and the person interdicted cannot regain the exercise of his civil rights, until after the judgment removing the interdiction. 33 V., c. 26, s. 9.

" **336***o*. The wife, or the son of full age, of any person so interdicted, may be appointed his curator.

When the wife of the person interdicted has been appointed, she has all the powers of curators to persons interdicted for prodigality, and is subject to the provisions of article 180 of this Code, save in so far as regards acts of simple administration, and for such acts her appointment as curatrix avails as full authorization. 33 V., c. 26, s. 10.

" **336***p*. Proceedings under this chapter are summary. 33 V., c. 26, s. 13.

Digitized by Google

"**336***q*. The name of every person interdicted under this chapter must be inscribed on the roll of interdicted persons, as in other cases of interdiction." 33 V., c. 26, s. 14.

SCHEDULE.

A.

FORM OF PETITION FOR INTERDICTION.

Province of Quebec,
District of

To the Honorable A. B., one of the judges of the Superior Court for the Province of Quebec:

C. D., of the parish of , in the said district, *farmer*, by this his petition, respectfully represents:

That for about year , E. F., of the said parish of , *farmer* (uncle *or* brother of the petitioner, *as the case may be*), has been an habitual drunkard, and that by reason of his drunkenness he squanders *or* mismanages his property, *or* places his family in trouble or distress, *or* transacts his business prejudicially to his family, his relations *or* his creditors, and that, therefore, it is desirable that in virtue of the law, the said E. F., be interdicted as an habitual drunkard.

Wherefore, your petitioner prays that the interdiction of the said E. F., as an habitual drunkard, be pronounced in accordance with the law.

33 V., c. 26, Schedule A.

B

FORM OF AFFIDAVIT WHICH MUST ACCOMPANY THE PETITION PRAYING FOR THE INTERDICTION.

C. D., the petitioner named in the foregoing petition, being duly sworn upon the Holy Evangelists, doth depose and say: That the facts alleged in the foregoing petition are true, and that the said

Digitized by Google

petition hath not been made through malice, nor with a view to oppress. And he hath (*declared himself to be unable to sign,*) or (*hath signed*) after the same hath been duly read to him.

Sworn before me, at , }
this , 18 }
J. S. C. }

33 V., c. 26, schedule B.

C.

JUDGE'S ORDER, CONVENING A FAMILY COUNCIL TO PROCEED TO THE INTERDICTION.

Considering the foregoing petition and affidavit, let the relations, whether of blood or by affinity, and in default of such relations, the friends of the said E. F., in the said petition mentioned, appear before me in chambers, in the court house, in the *city* or *town*, etc., on the day of , 18 , at o'clock in the noon, for the purpose of proceeding upon the said petition. 18

J. S. C.

33 V., ch. 26, Schedule C.

5791. Article 339 shall read as follows :

"**339.** With the exception of curators to habitual drunkards, curators to the person are appointed with the formalities and according to the rules prescribed for the appointment of tutors.

They are sworn before entering upon their duties." C. C., 339 ; 33 V., c. 26, s. 1.

5792. Article 343 shall read as follows :

"**343.** The curator to a person interdicted for imbecility, insanity or madness has over such person and his property all the powers of a tutor over the person and property of a minor ; and he is bound towards him in the same manner as the tutor is towards his pupil.

These powers and obligations extend only to the property when the interdiction is for prodigality or habitual drunkenness." C. C., 343 ; 42-43 V., c. 28, s. 1.

Digitized by Google

5793. Article 347 shall read as follows:

"**347.** Curators to property are those appointed:

1. To the property of absentees;
2. In cases of substitution;
3. To vacant estates;
4. To the property of extinct corporations;
5. To property abandoned by insolvent traders who have made an abandonment of their property for the benefit of their creditors, or by arrested or imprisoned debtors, or on account of hypothecs;
6. To property accepted under benefit of inventory." C. C., 347; 48 V., c. 22, s. 4; 49-50 V., c. 12, s. 1.

5794. The following chapter is added after chapter fourth of title tenth of book first:

"**351***a*. In the case of the sale of capital sums, such as shares or interest in financial, commercial or manufacturing joint stock companies, or public securities, belonging to minors, interdicted persons or absentees or to substitutions, the judge or the court, authorizing such sale upon the advice of a family council, may, if he or it deem it meet, order that the sale be made, at the current rate upon the stock exchange, by a broker or other person appointed for that purpose, without advertisement or other formalities; and the judge or court in case he or it may deem the same advisable, may authorize, during such delay as shall be determined, the gradual disposal of such securities at the current rate upon the stock exchange.

The person appointed shall make a report of all sales by him made, and deposit it in the clerk's office where the authorization for the sale has been deposited, with an attestation under oath, showing the market value of similar securities sold upon the stock exchange on the day of each sale. 42-43 V., c. 26, ss. 1 and 2.

"**351***b*. Articles 298 and 299 of this Code, and the fifth title of of the third part of the Code of Civil Procedure, do not apply to the sale of immoveable property or immoveable rights, belonging to minors or persons incapable of acting for themselves, nor to the sales of the capital sums, shares or interest of such minors or persons, in any financial, commercial or manufacturing joint stock company, the real value of which does not exceed the sum of four hundred dollars.

The sale may take place in the manner set forth in article 6016 of the Revised Statutes of Quebec." 35 V., c. 7, s. 1; 36 V., c. 17, s. 1; 36 V., c. 18, s. 1.

Digitized by Google

5795. Article 365 shall read as follows :

" **365.** In consequence of the disabilities which arise from their corporate character, they can neither be tutors nor curators, nor can they take part in meetings of family councils.

They cannot be entrusted with the execution of wills or any other administration which necessitates the taking of an oath, or imposes personal responsibility.

They cannot be summoned personally, nor appear in court otherwise than by attorney.

They cannot sue nor be sued for assaults, battery or other violence to the person.

They cannot serve as witnesses nor as jurors before the courts.

They can neither be guardians nor judicial sequestrators, nor can they be charged with any other functions or duties the exercise of which might entail imprisonment." C. C., 365 ; C. S. L. C., c. 34, s. 6.

5796. The following article is added after article 366 :

" **366***a*. All corporations which, under the provisions of their charters or of the law, cannot acquire real estate except to a limited amount, have the right, whenever they dispose of or alienate any real estate belonging to them, to apply the price thereof to the acquisition of other real estate, and also to receive the revenues thereof and to employ the same for the objects for which they were constituted." 42-43 V., c. 34, s. 1.

5797. Article 368 shall read as follows :

" **368.** Corporations are dissolved :

I. By any act of the legislature declaring their dissolution ;

2. By the expiration of the term or the accomplishment of the object for which they were formed, or the happening of the condition attached to their creation ;

3. By forfeiture legally incurred ;

4. By the natural death of all the members, the diminution of their number, or by any other cause of a nature to interrupt the corporate existence, when the right of succession is not provided for in such cases ;

5. By the mutual consent of all the members, subject to the modifications and under the circumstances hereinafter determined ;

6. By voluntary liquidation in the cases by law provided." C. C., 368 ; 42-43 V., c. 31, ss. 5 and 22.

Digitized by Google

5798. Article 371 shall read as follows :

" **371.** Saving the case of the voluntary liquidation of joint stock companies, a dissolved corporation is, for the liquidation of its affairs, in the same position as a vacant succession. The creditors and others interested have the same recourse against the property which belonged to it, as may be exercised against vacant successions and the property belonging to them." C. C., 371 ; 42-43 V., c. 31, s. 22.

5799. The following article is added after article 373 :

" **373***a*. In the case of the voluntary liquidation of a joint stock company, one or more liquidators are appointed in the manner required by law, for the purpose of winding up the affairs and of distributing the assets of the company." 42-43 V., c. 31, ss. 5 and 22.

5800. Article 428 shall read as follows :

" **428.** Pigeons, rabbits and fish which go into another dove-cote, warren or pond, become the property of him to whom such pond, warren or dove-cote belongs, provided they have not been attracted there by fraud or artifice.

Bees living in a state of freedom are the property of the person discovering them, whether or not he be proprietor of the land on which they have established themselves.

Whenever a swarm of bees leaves a hive, the proprietor may reclaim them, so long as he can prove his right of property therein, and he is entitled to take possession of them at any place on which they may settle, even if such place be on the land of another person, provided, however, that he notify the proprietor of such land and compensate him for all damages, and unless the swarm settles in a hive which is already occupied, in which case the proprietor loses all right of property in such swarm.

If the proprietor of a swarm of bees decline to follow such swarm, and another person undertake the pursuit, such other person is substituted in the rights of the proprietor, and every swarm which is not followed becomes the property of the proprietor of the land on which it settles, without regard to the place from which it came.

Any unpursued swarm which lodges on any property whatsoever, without settling thereon, may be secured by the first comer, unless the proprietor of the land objects." C. C., 428 ; 28 V., c. 8, ss. 1, 2, 3, 4 and 5.

Digitized by Google

5801. The following article is added after article 650 :

" **650***a*. Letters of verification may be obtained in the case of a succession *ab intestat*, devolving in this Province, having property situate outside of its limits or debts due by persons not residing therein.

The procedure in such case is regulated by the Code of Civil Procedure." 41 V., c. 10, s. 1.

5802. Article 945 shall read as follows :

" **945.** All substitutes, born and unborn, are represented in all inventories and partitions by a curator to the substitution, appointed in the manner established as regards tutors. The curator to the substitution attends to the interest of such substitutes and represents them in all cases in which his intervention is requisite or proper.

The institute who neglects to demand this nomination may be declared to have forfeited in favor of the substitute the benefit of the disposition.

All persons who are competent to demand the appointment of a tutor to a minor of the same family, may also demand the nomination of a curator to the substitution." 38 V., c. 13, s. 1.

5803. The following chapters are added after chapter fourth of title second of book third :

" CHAPTER FOURTH (A).

OF TRUSTS.

" **981***a*. All persons capable of disposing freely of their property may convey property, moveable or immoveable, to trustees by gift or by will, for the benefit of any persons in whose favor they can validly make gifts or legacies. 42-43 V., c. 29, s. 1.

" **981***b*. Trustees, for the purposes of their trust, are seized as depositaries and administrators for the benefit of the donees or legatees of the property, moveable or immoveable, conveyed to them in trust, and may claim possession of it, even against the donees or legatees for whose benefit the trust was created.

This seizin lasts only for the time stipulated for the duration of the trust ; and while it lasts, the trustees may sue and be sued and

Digitized by Google

take all judicial proceedings for the affairs of the trust. 42-43 V., c 29, s. 2.

" **981***c*. The donor or testator creating the trust may provide for the replacing of trustees as long as the trust lasts, in case of refusal to accept, of death, or other cause of vacancy, and indicate the mode to be followed.

When it is impossible to replace them under the terms of the document creating the trust, or when the replacement is not provided for, any judge of the Superior Court may appoint replacing trustees, after notice to the benefited parties. 42-43 V., c. 29, s. 3.

" **981***d*. Trustees dissipating or wasting the property of the trust, or refusing or neglecting to carry out the provisions of the document creating the trust, or infringing their duties, may be removed by the Superior Court. 42-43 V., c. 29, s. 4.

" **981***e*. The powers of a trustee do not pass to his heirs or other successors, but the latter are bound to render an account of his administration. 42-43 V., c. 29, s. 5.

" **981***f*. When there are several trustees, the majority may act, unless it be otherwise provided in the document creating the trust. 42-43 V., c. 29, s. 6.

" **981***g*. Trustees act gratuitously, unless it be otherwise provided in the document creating the trust.

All expenses incurred by trustees, in the fulfilment of their duties, are borne by the trust." 42-43 V., c. 29, s 7.

" **981***h*. Trustees are obliged to execute the trust which they have accepted, unless they be authorized by a judge of the Superior Court to renounce ; and they are liable for damages resulting from their neglect to execute it, when not so authorized. 42-43 V., c. 29, s. 8.

" **981***i*. Trustees are not personally liable to third parties with whom they contract. 42-43 V., c. 29, s. 9.

" **981***j*. The trustees, without the intervention of the parties benefited administer the property vested in them and dispose of it, invest moneys which are not payable to the parties benefited, and

Digitized by Google

alter, vary and transpose, from time to time, the investments, in accordance with the provisions and terms of the document creating the trust.

In default of instructions, the trustees make investments without the intervention of the parties benefited, in accordance with the provisions of article 981*o*. 42-43 V., c. 29, s. 10.

" **981***k*. Trustees are bound to exercise, in administering the trust, reasonable skill and the care of prudent administrators ; but they are not liable for depreciation or loss in investments made according to the provisions of the document creating the trust, or of the law, or for loss on deposits made in chartered banks or savings banks, unless there has been bad faith on their part in making such investments or deposits. 42-43 V., c. 29, s. 11.

" **981***l*. At the termination of the trust, the trustees must render an account, and deliver over all moneys and securities in their hands to the parties entitled thereto under the provisions of the document creating the trust, or entitled thereto by law.

They must also execute all transfers, conveyances, or other deeds necessary to vest the property held for the trust in the parties entitled thereto. 42-43 V., c. 29, s. 12.

" **981***m*. Trustees are jointly and severally bound to render one and the same account, unless the donor or testator who created the trust has divided their functions, and each has kept within the scope assigned to him.

They are also jointly and severally responsible for the property vested in them, in their joint capacity, and for the payment of any balance in hand, or for any waste or for any loss arising from wrongful investments, saving where they are authorized to act separately, in which case those having acted separately, within the scope assigned to them, are alone liable for such separate administration. 42-43 V., c. 29, s. 13.

" **981***n*. Trustees are liable to coercive imprisonment for whatever is due, by reason of their administration, to those to whom they are accountable, subject to the provisions contained in the Code of Civil Procedure. 42-43 V., c. 29, s. 14.

Digitized by Google

"CHAPTER FOURTH (B).

OF THE INVESTMENT OF MONEYS BELONGING TO OTHER PERSONS.

"**981***o*. Except in the case of testamentary executors otherwise authorized by the will, in that of institutes under a substitution otherwise authorized by the instrument creating the substitution, and in that of trustees otherwise authorized by the instrument constituting such trust, every institute in whatever degree under a substitution, howsoever created, every executor under any will, and every tutor, curator or trustee having as such the possession or administration of property belonging to another, or held by him for the benefit of another, bound by law to invest money held by him as such administrator, must invest moneys held by them as such in Dominion or Provincial stock or in public securities of the United Kingdom or of the United States of America, or in municipal stock or debentures, or in real estate in this Province, or on first privilege or hypothec upon real estate in this Province to an amount not exceeding three-fifths of the municipal valuation of such real estate. 33 V., c. 19, ss. 1 and 2; 42-43 V., c. 29, ss. 1, 2 and 10; 42-43 V., c. 30, s. 1; 46 V., c. 24, ss. 1 and 2.

"**981***p*. The institute, executor, administrator, tutor, curator or trustee, making investments in accordance with the preceding article, is exempt from all responsibility respecting the investments so made, saving always in the case of fraud, which renders these persons responsible for the damages occasioned by their fraud, under pain of coercive imprisonment, subject to the provisions contained in the Code of Civil Procedure. 42-43 V., c. 30, ss. 1 and 3.

"**981***q*. The institute, executor, administrator, tutor, curator and trustee, when investments are made otherwise than as provided in article 981*o*, or than as ordered by the will appointing the executors or administrators, or by the document creating the substitution or trust, are obliged to indemnify the parties to whom they are accountable for losses caused by the depreciation of the securities invested in, under pain of coercive imprisonment, subject to the provisions contained in the Code of Civil Procedure. 42-43 V., c. 30, s. 2.

"**981***r*. Whenever the terms of the instrument give such per-

Digitized by Google

sons the power to invest moneys, and a full or restricted discretion as to the nature or manner of such investment, they are held to have the like power and discretion to change from time to time any such investment they may have made, by selling the property in which they had invested, and re-investing the proceeds as they might originally have done. 33 V., c. 19, s. 3.

5804. Article 1162 shall read as follows:

"**1162.** When a creditor refuses to receive payment, the debtor may make an actual tender of the money or other thing due; and, in any action afterwards brought for its recovery, he may plead and renew the tender, and if the thing due be a sum of money, may deposit the amount; and such tender, or such tender and deposit, if the thing due be a sum of money, are equivalent with respect to the debtor to a payment made on the date of the first tender; provided that from the date of the first tender the debtor continue always ready and willing to deliver the thing or to pay the sum of money.

Whenever any person desires to pay any sum of money and is prevented from doing so by reason of the refusal of his creditor or of the absence of his creditor from the place where the debt is payable, such person may deposit such sum in the general deposit office for the Province in accordance with the provisions of the law respecting judicial deposits; such deposit frees the debtor from the payment of interest from the date thereof, provided that the creditor present had without lawful right refused to accept the offers." C. C., 1162; 35 V., c. 5, s. 8; 49-55 V., c. 101, ss 38 and following.

5805. Article 1207 shall read as follows:

"**1207.** The following writings, executed or attested with the requisite formalities by a public officer having authority to execute or attest the same in the place where he acts, are authentic and make proof of their contents, without any evidence of the signature or seal appended to them, or of the official character of such officer being necessary, that is to say:

Copies of the acts of the Imperial Parliament, of the Parliament of the Province of Canada, and of the Parliament of the Dominion of Canada, and copies of the Edicts and Ordinances, and of the Ordinances of the Province of Quebec, and of the statutes and Ordinances of the Province of Lower Canada, and of the statutes of Upper Canada, printed by the printer duly authorized by Her Majesty the Queen, or by any of her predecessors;

Digitized by Google

Copies of acts of the Legislatures of the provinces forming the Dominion of Canada, or of any of the provinces or territories, hereafter admitted into the Dominion, printed by a Queen's printer, or other printer by authority, for the Government of any of the said provinces or territories;

Letters-patent, commissions, proclamations and other instruments issued by Her Majesty the Queen, or by the executive Government of the Province of Canada or of the Dominion of Canada;

Letters-patent, orders in council, commissions, proclamations and other instruments issued by the Government of this Province;

Copies of official documents, proclamations or announcements, printed by a Queen's printer, or other printer by authority for the government of a province of the Dominion of Canada and of the provinces or territories hereafter admitted into the Dominion.

Official announcements in the Canada Gazette and in the Quebec Official Gazette published by authority;

The records, registers, journals and public documents of the several departments of the Executive Government and of the Parliament of the Province of Canada and of the Dominion of Canada, as well as those of the Executive Government and Legislature of this Province;

The records and registers of courts of justice and of judicial proceedings in the Province;

The books and registers of a public character required by law to be kept by official persons in the Province;

The books, registers, by-laws, records and other documents and papers of municipal corporations and of other corporations of a public character in this Province;

Official copies and extracts of and from the books, documents and writings above mentioned, and certificates and all other writings included within the legal intendment of this article, although not enumerated." C. C., 1207; 31 V., c. 13, s. 9; 31 V., c. 18, ss. 1 and 2; 32 V., c. 10, ss. 1 and 2; 49-50 V., c. 100, s. 13. *See R. S. C., c. 139.*

5806. Artile 1208 shall read as follows:

"**1208.** Saving wills, a notarial deed received before one notary alone is authentic." C. C., 1208; 46 V., c. 32, s. 48.

5807. Artice 1209 shall read as follows:

"**1209.** Notifications, summonses, protests and services, by which a reply is required, may be made by one notary, whether the

Digitized by Google

party in whose name they are made has or has not signed the deed.

Such instruments are authentic and make proof of their contents until contradicted or disavowed.

But nothing inserted in any such instrument, as the answer of the party upon whom the same is served, is proof against him, unless it be signed by such party.

With the exception of the notifications, summonses, protests and services which precede, all other notifications, summonses, protests and services may be made by an ordinary notarial deed signed in the office of the notary or elsewhere.

In such case it is sufficient for the notary to serve a copy of such deed upon the person to be so notified, summoned or protested, or at his domicile.

It is not necessary to deliver to the adverse party a copy of the *procès-verbal* of service; such *procès-verbal* may be drawn up and signed afterwards." 47 V., c. 14, s. 1; 48 V., c. 18, s. 1.

5808. Article 1231 shall read as follows:

"**1231.** All persons are legally competent to give testimony, except:

1. Persons deficient in understanding, whether from immaturity of age, insanity or other cause;

2. Those insensible to the religious obligation of an oath;

3. Those civilly dead;

4. Those declared infamous by law;

5. Husband and wife, for or against each other, except in the case provided for in article 252 of the Code of Civil Procedure, when one of the consorts, separate as to property, administers as agent the property of the other." C. C., 1231; 35 V., c. 6, s. 9.

5809. Article 1265 shall read as follows:

"**1265.** After marriage, the marriage covenants contained in the contract cannot be altered, (even by the donation of usufruct, which is abolished,) nor can the consorts in any other manner confer benefits *inter vivos* upon each other, except in conformity with the provisions of the law, under which a husband may, subject to certain conditions and restrictions, insure his life for his wife and children." C. C., 1265; 41-42 V., c. 13, s. 2 and following.

5810. Article 1336 shall read as follows:

'**1336.** If the dissolution be demanded by the survivor, and

Digitized by Google

some of the children be still minors, his demand must be preceded by an inventory, which he must make according to the form of that required to prevent the continuation of community, and for such purpose the subrogate tutor represents the minors and stands as an adverse party." 38 V., c. 13, s. 1

5811. Article 1543 shall read as follows :

" **1543.** In the sale of moveable things the right of dissolution by reason of non-payment of the price can only be exercised while the thing sold remains in the possession of the buyer, without prejudice to the seller's right of revendication as provided in the title of *Privileges and Hypothecs.*

In the case of insolvency such right can only be exercised during the fifteen days next after the delivery." C. C., 1543 ; 48 V., c. 20, s. 1.

5812. The following section is added after section second of chapter sixth of title fifth of book third :

" **1561***a.* Whenever any land has been sold under a deed of sale, or under a promise of sale or contract in the nature of a promise of sale followed by tradition and actual possession, and the vendor is entitled, by reason of non-payment of the price or any other cause, to demand the dissolution of the sale, if the buyer have abandoned the land and has left it so abandoned during two years or more, the vendor may recover the land and re-enter into possession of the same by observing the formalities prescribed in the Code of Civil Procedure. 33 V., c. 16, ss. 1 and 13.

" **1561***b.* Every buyer, who has ceased to occupy the land by himself or by his family and who has made no transfer of his rights in the land, or who, having made a transfer, has not notified the vendor in writing, of such transfer, is deemed to have abandoned the land.

No actual possession of the land by any person whatever shall be deemed to be a notice of any such transfer." 33 V., c. 16, ss. 1 and 12.

5813. Article 1565 shall read as follows :

" **1565.** The voluntary sale by auction of goods, wares, merchandise or effects cannot be made by any person other than a licensed auctioneer, subject to the following exceptions :

1. The sale of goods or effects belonging to the Crown or seized

Digitized by Google

by a public officer under judgment or process of any court or as being forfeited ;

2. The sale of goods of minors by forced or by voluntary licitation ;

3. The sale of property, at any bazaar held for religious or charitable purposes, or the sale of property for religious purposes ;

4. The sale of goods and effects belonging to deceased persons or to any dissolution of community, or to any church ;

5. The sale of personal property, grain, or cattle for non-commercial purposes by the inhabitants of the rural districts, removing from the locality ;

6. The sale at exhibitions of farm animals exhibited by agricultural societies ;

7. Sales for municipal taxes under municipal laws." C. C., 1565 ; 41 V., c. 3, s. 109 ; 48 V., c. 7, s. 1.

5814. The following articles are added after article 1571 ;

" **1571***a*. Whenever, in the case of a sale of a debt or a right of action, the debtor has left or has never had his domicile in this Province, the signification of the sale required by article 1571 may be effected, by publishing a notice of the said sale, twice in the French language, in a newspaper published in the French language, and twice in the English language, in a newspaper published in the English language, in the district in which the debt was contracted or in which the action may be instituted ; and in default of such newspapers in such district, then in similar newspapers in the nearest locality.

The delivery of a copy of the deed of sale, required by the said article 1571 may be effected, by leaving such copy for the debtor in the hands of the prothonotary of the district in which the signification was published. 35 V., c. 6, s. 3.

" **1571***b*. Whenever in either of the cases mentioned in the preceding article, an action has been brought against the debtor, the service of the action, in the manner prescribed by article 68 of the Code of Civil Procedure, is a sufficient signification of the deed of sale, if in the order published in virtue of the said article, the sale is mentioned and described ; and the filing of a copy of the deed of sale together with the return of the action, is sufficient delivery thereof to the debtor. 35 V., c. 6, s. 4.

Digitized by Google

"**1571***c*. Whenever a whole class of rents or debts collectively are sold, the signification of the sale required by article 1571 may be effected by causing the deed of sale to be published in the manner prescribed by article 1571*a*, and the delivery of the copy may be effected by depositing a copy of the deed of sale in the office of the prothonotary of the district in which the succession opened, or in which are situated the lands charged with such debts, or of the district in which is or was the chief place of business of the original creditor.

Such publication and deposit shall be a sufficient signification and delivery with respect to each debtor individually." 35 V., c. 6, s. 5.

SCHEDULE.

FORM OF NOTICE.

In connection with article 1571*a*.

To (*name and designation of the debtor,*)

Notice is hereby given you that the debt (*or* right of action) which (*name of the selling creditor*) had against you by virtue of (*description of the title on which the debt or the right is founded*) has been sold and conveyed to (*name, designation and residence of the purchasing creditor*) by virtue of an instrument (*before notaries or by private writing*) executed at , the day of , in the year , in the presence of (*witness or the name of the notary.*)

35 V., c. 6. Schedule.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google